279 N.C. App.—No. 1 Pages 1-108

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 15, 2022

MAILING ADDRESS: The Judicial Department
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COURT OF APPEALS

CASES REPORTED

FILED 17 AUGUST 2021

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Appeal from custody order—motion to dismiss—Appellate Rule violations— A father's motion to dismiss the mother's appeal from a permanent custody order was denied. The mother could not have violated Appellate Rule 7(a)(1), as the father asserted, because that subsection was deleted from the Rules in 2017. Although the mother did violate Rule 28(b)(6) by failing to state the applicable standard of review for some of the issues she raised in her brief, the Court of Appeals chose to hear the appeal because the Rule violation did not impair its ability to review the mother's arguments. **Waly v. Alkamary, 73.**

Rule 58—child custody action—motion to stay proceedings—oral ruling not put in writing—In an appeal from a permanent custody order, the Court of Appeals lacked jurisdiction to review the mother's argument that the trial court should have stayed the custody proceeding based on North Carolina being an inconvenient forum. Even if the mother's pro se letter to the district court clerk's office had qualified as a proper motion to stay under Civil Procedure Rule 7(b), the trial court never entered a written order memorializing its oral ruling (denying the motion), as required under Rule 58. **Waly v. Alkamary, 73.**

ATTORNEY FEES

Civil contempt order—vacated—no legal basis for attorney fees—Where the trial court's order holding a father in civil contempt for willful violation of a child custody and support consent order was vacated because the consent order was

N.C. COURT OF APPEALS
2022 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	10 and 24
February	7 and 21
March	7 and 21
April	4 and 25
May	9 and 23
June	6
August	8 and 22
September	5 and 19
October	3, 17, and 31
November	14 and 28
December	None (unless needed)

Opinions will be filed on the first and third Tuesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

85' AND SUNNY, LLC, PETITIONER
v.
CURRITUCK COUNTY, RESPONDENT

No. COA20-648

Filed 17 August 2021

1. Zoning—unified development ordinance—board of adjustment decision—review by trial court—standard of review

In its review of a county board of adjustment's decision regarding petitioner-LLC's proposed plan for major improvements to its campground, which operated as a nonconforming use under the county's unified development ordinance, the trial court properly articulated and applied the appropriate standard of review for each issue on appeal.

2. Zoning—unified development ordinance—board of adjustment decision—review by trial court—application of whole record test

In its review of a county board of adjustment's decision regarding petitioner-LLC's proposed plan for major improvements to its campground, which operated as a nonconforming use under the county's unified development ordinance, the trial court erred in its application of the whole record test by replacing the board's judgment—as to the number of campsites at the campground on the determinative date—with its own judgment, where the board's determination was supported by substantial evidence.

3. Zoning—unified development ordinance—board of adjustment decision—review by trial court—new facilities

In its review of a county board of adjustment's decision regarding petitioner-LLC's proposed plan for major improvements to its campground, which operated as a nonconforming use under the county's unified development ordinance (UDO), the trial court erred by reversing the board's conclusion that new facilities proposed by petitioner were an impermissible expansion, enlargement, and intensification of a nonconforming use and not permitted under the UDO. However, the trial court properly affirmed the board's conclusion that petitioner's proposed swimming pool was not permitted under the UDO.

Appeal by Respondent and cross-appeal by Petitioner from order entered 2 March 2020 by Judge L. Lamont Wiggins in Currituck County Superior Court. Heard in the Court of Appeals 8 June 2021.

Williams Mullen, by Thomas H. Johnson, Jr., and Lauren E. Fussell, for Petitioner-Appellee/Cross-Appellant.

Currituck County Attorney Donald I. McRee, Jr., for Respondent-Appellant/Cross-Appellee.

COLLINS, Judge.

¶ 1 This case arises from improvements 85 Degrees and Sunny, LLC ("Petitioner"), seeks to make to a campground located in Currituck County, North Carolina. Both Currituck County ("Respondent") and Petitioner appeal from the superior court's order reversing the Currituck County Board of Adjustment's ("Board") (1) determination of the number of campsites that existed on Petitioner's campground as of 1 January 2013, and (2) conclusion that Currituck County's Unified Development Ordinance ("UDO") permitted some, but not all, of Petitioner's proposed improvements to the campground. We affirm in part and reverse in part the superior court's order and remand to the superior court to essentially affirm the Board's entire order.

I. Procedural History and Factual Background

¶ 2 The Hampton Lodge Campground ("Campground") has existed since at least May 1967. At the time the Campground began operation, the County did not regulate the use of property by zoning regulations. Under the County's initial 1971 zoning ordinance, campgrounds were

a permitted use of property in certain districts, subject to certain requirements. There was no documentation that the Campground's owners had complied with the 1971 ordinance's requirements for approved campgrounds and the Campground operated as a nonconforming use. The Campground has continued as a nonconforming use under subsequent County zoning regulations adopted in 1975, 1982, 1989, 1992, 2007, and 2013.

¶ 3 Under the current UDO, adopted in 2013, the Campground continues to be a nonconforming use. The UDO provides that "[a] nonconforming use shall not be changed to any other nonconforming use[,]" UDO § 8.2.2., and generally "shall not be enlarged, expanded in area, or intensified[,]" UDO § 8.2.3.A. Additionally, section 8.2.6. of the UDO deems all existing private campgrounds as nonconforming uses, subject to certain standards, including in relevant part:

> **A. General Standards**
>
> **(1)** Camping is an allowed use of land only in existing campgrounds and campground subdivisions.
>
> . . . .
>
> **(5)** Modifications to existing campgrounds are permitted provided the changes do not increase the nonconformity with respect to [the] number of campsites that existed on January 1, 2013.
>
> **B. Existing Campgrounds**
>
> **(1)** Existing campgrounds may not be expanded to cover additional land area or exceed the total number of campsites that existed on January 1, 2013.

UDO § 8.2.6.

¶ 4 Throughout the Campground's history, owners and developers have submitted documentation to county entities reflecting varying numbers of campsites in existence. A camper subdivision plat showing over 700 campsites was submitted in 1973, but never approved. A site plan submitted alongside an application for a conditional use permit for a concert in 1996 showed 234 campsites at the property, 90 vehicular parking spaces, and a tent camping area. A site plan submitted with a similar application in 1997 again showed 234 campsites and a tent camping area.

Neither plan indicated the specific number of tent campsites within the tent camping area.

¶ 5 Petitioner purchased the Campground in June 2018 and submitted a Major Site Plan ("Plan") to Currituck County for review. The Plan showed 314 campsites for recreational vehicle, trailer, or camper use, and 78 campsites for tent camping. The Plan also proposed the following improvements:

- two new restroom and bathhouse facilities,
- a swimming pool and pool house,
- improvements to the on-site septic system,
- two dog park areas,
- playground improvements, and
- the demolition and replacement of an existing residence and barn for the caretaker/manager of the campground.

¶ 6 In its review of the Plan, the County determined that the number of campsites exceeded the number of campsites that existed on 1 January 2013, and the additional amenities shown on the Plan were not permitted under the UDO.[1]

¶ 7 In August 2018, Petitioner filed an Application for Interpretation and supporting materials with the Currituck County Planning and Development Director ("Director"). Petitioner sought a determination of (1) the number of campsites existing on the Campground on 1 January 2013 and (2) whether the UDO allowed Petitioner's proposed improvements to the property.

¶ 8 The Director issued a Letter of Determination ("Letter") on 1 January 2013 wherein the Director determined "that 234 campsites have received some form of approval between 1971 and 1997 and 234 campsites existed on January 1, 2013." The Director also determined that the number of "[t]ent campsites would need to be calculated based on the historical tent area divided by the minimum campsite size (3000 square feet) required by all zoning regulations before the 2013 UDO." The Director could "[]not verify, and therefore [did] not conclude, that 78 tent campsites were established prior to January 1, 2013."

¶ 9 Regarding Petitioner's proposed improvements, the Director interpreted the term "modification" in section 8.2.6.A.(5) to require that

1. A copy of the County's determination is not in the Record on Appeal but is referenced in Plaintiff's Petition for Writ of Certiorari to the superior court.

"something needs to exist before a change, alteration, or amendment can be made[,]" and concluded as follows: "only changes to existing buildings and structures are permitted"; existing facilities—"restroom facilities, piers, docks, bulkheads, camp store, and other recreation facilities"—could be modified; "[t]he new facilities listed in the application . . . such as the new bathroom facilities, swimming pool, pool house and the like" "are not limited changes but are substantial and an impermissible expansion, enlargement and intensification of a nonconforming use" prohibited under section 8.2.3.A.

¶ 10 Petitioner appealed to the Board. At the hearing before the Board, the Director testified to the history of permits applied for and issued to the Campground, including the 1996 and 1997 conditional use permits. Petitioner tendered Warren Eadus, who was accepted as an expert witness in site plans. Eadus testified that there were 408 RV sites and 50 tent sites at the Campground. Paul O'Neal, who resided three miles south of the Campground for 50 years, testified that he was hired to perform maintenance on the campsites in 1980. O'Neal testified that in 1980, there were 175 to 200 campsites, and the Campground had not changed from that time. John Pappas, a previous owner of the Campground, testified that there were 252 utility hookups, that a previous music festival was held with close to 400 camping units in attendance, and stargazers had camped for 25 years in the wooded portion of the property.

¶ 11 Other previous owners averred that "[c]ampers have been free to utilize the entire premises for their campsite" and "[t]here has never been a limitation imposed on the number of the sites, the location of the sites, nor occupancy by vehicles of any kind, or tents, or simply sleeping bags and campfire sites." Ann Slade, a co-manager of the Campground since 1998, averred that the entire Campground was used "as needed for tents, trailers and recreational vehicles." Slade averred that in addition to the campsites with utility connections, campers would use campsites in both the forested and open field areas of the property. According to Slade, during music festivals in 1995 through 1997, approximately 400 campsites were used at the Campground. Similarly, James Baeurle, Petitioner's current operator, testified to the Board that on many occasions, 400 to 500 people camped at the campground for one event.

¶ 12 After the hearing, the Board issued an order wherein it found, in part:

> 27. On January 1, 2013, there were 234 existing campsites and a designated area which was used for tent camping at Hampton Lodge.

> 28. The number of campsites within the tent camping area should be calculated based on the designated area for tent camping on a scaled version of the 96/97 site plan, divided by the minimum campsite size (3000 square feet) required by all zoning regulations prior to the 2013 UDO.
>
> . . . .
>
> 36. Modifications to existing buildings and structures are permitted inasmuch as the changes do not extend to additional structures or to land outside the original structure.
>
> 37. Sunny's proposal and site plan includes the addition of new facilities to Hampton Lodge, i.e. new bathroom facilities, swimming pool, pool house, piers etc.

¶ 13 Upon its findings, the Board concluded, in relevant part:

> 3. Pursuant to 2013 UDO §§ 2.4.16(D)(3) and 10.1, 2013 UDO §8.2.6.A.(5) must be read in pari materia with the 2013 UDO, specifically 2013 UDO §8.
>
> 4. Modifications to existing buildings and structures are permitted inasmuch as the changes do not extend to additional structures or to land outside the original structure.
>
> 5. The new facilities proposed by Sunny qualify as an impermissible expansion, enlargement and intensification of a nonconforming use and are not permitted.

Based upon its findings of fact and conclusions of law, the Board affirmed the Director's Letter.

¶ 14 Petitioner petitioned the superior court for a writ of certiorari to review the Board's decision. After reviewing the record on appeal, the Plan, the UDO, and the memoranda of the Parties, and hearing oral arguments on 27 January 2020, the superior court granted certiorari and reversed the Board. By written order, the superior court found in relevant part:

> 12. The . . . requested number of RV and tent campsites proposed in Petitioner's Major Site Plan are

consistent with the number of campsites in existence on Hampton Lodge on January 1, 2013. Therefore, the Court hereby allows 314 RV sites and 78 tent sites on the Property and finds the number of proposed campsites does not exceed the number of campsites in existence on the property as of January 1, 2013, and does not increase or expand the intensity of the nonconforming use, as set forth in Section 8.2.6 of the UDO. Notably, the property has potential, excluding wetland acreage, to be developed differently, and more intensely, than as proposed by Petitioner on the Major Site Plan.

13. . . . [A]ll health and safety improvements to Hampton Lodge that are included on the Major Site Plan, specifically including, infrastructure improvements to update access roads and water and septic systems on the property, do not violate the provisions of the UDO governing nonconforming uses. The new bathhouses and expansions of existing bathhouses proposed in the Major Site Plan are permitted improvements to the Property pursuant to the provisions of the UDO. The Court finds the proposed health and safety improvements to Hampton Lodge do not increase or intensify the nonconforming use and are in keeping with the public policy of the State of North Carolina to allow improvements to nonconforming uses to enhance health and safety.

14. The Major Site Plan also proposes adding a porch to the existing footprint of the Camp Store located on the property. While the proposed porch addition is not within the footprint of the Camp Store in existence on January 1, 2013, the proposed addition is an appendage that will not increase the intensity or scope of the nonconforming use. Therefore, the proposed porch on the Camp Store is allowed.

15. The Major Site Plan proposes installing a pool on Hampton Lodge. The pool is not permitted within the provisions of the UDO and is not allowed.

¶ 15 The superior court concluded, in relevant part:

> 16. The . . . Board of Adjustment's decision was arbitrary and capricious [and] not supported by substantial, competent and material evidence in view of the entire record as set forth above.
>
> 17. The . . . Board of Adjustment committed an error of law in concluding that the new facilities proposed by Petitioner qualify as impermissible expansion, enlargement and intensification of a nonconforming use and are not permitted under the UDO, with the exception of the swimming pool.

The superior court thus

> remanded with instructions for the Board of Adjustment to reverse the [Letter] and find that at least 314 campsites for RV, trailer, or camper use and 78 sites for ordinary tent camping as shown on the Major Site Plan existed as of January 1, 2013, and that the modifications shown on the Major Site Plan, except for the pool, are in compliance with the provisions of the UDO, should be allowed, and do not increase or expand the intensity of the nonconforming use.

¶ 16 Respondent appealed and Petitioner cross-appealed.

II. Discussion

¶ 17 On appeal, Respondent contends that the superior court erred by (1) failing to articulate the standard of review applied to each issue; (2) reversing the Board's decision as to the number of campsites existing at the Campground on 1 January 2013; and (3) reversing the Board's decision that certain modifications proposed in Petitioner's Plan were not permitted under the UDO. Petitioner contends that the superior court erred by affirming the Board's determination that the swimming pool was not allowed under the UDO.

A. Standard of Review

¶ 18 A different standard of review applies at each level of an appeal from a decision of an administrative official charged with enforcing a zoning or unified development ordinance. A "board of adjustment shall hear and decide appeals from decisions of administrative officials charged with enforcement of the zoning or unified development

ordinance . . . ."[2] N.C. Gen. Stat. § 160A-388(b1) (2019); N.C. Gen. Stat. § 153A-345.1 (2019) ("The provisions of [N.C. Gen. Stat. §] 160A-388 are applicable to counties.").[3] In such an appeal, "the board of adjustment may reverse or affirm, wholly or partly, or may modify the decision appealed from and shall make any order, requirement, decision, or determination that ought to be made." N.C. Gen. Stat. § 160A-388(b1)(8). Additionally, "[t]he board shall have all the powers of the official who made the decision." *Id.*

¶ 19 A party may seek superior court review of a board of adjustment's decision by filing a petition for review in the nature of certiorari. N.C. Gen. Stat. § 160A-388(e2)(2) (2019).

> (1) When reviewing the decision of a decision-making board under the provisions of this section, the court shall ensure that the rights of petitioners have not been prejudiced because the decision-making body's findings, inferences, conclusions, or decisions were:
>
> a. In violation of constitutional provisions, including those protecting procedural due process rights.
>
> b. In excess of the statutory authority conferred upon the city or the authority conferred upon the decision-making board by ordinance.
>
> c. Inconsistent with applicable procedures specified by statute or ordinance.
>
> d. Affected by other error of law.
>
> e. Unsupported by substantial competent evidence in view of the entire record.
>
> f. Arbitrary or capricious.

N.C. Gen. Stat. § 160A-393(k) (2019).

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2. The Director is the County's administrative official charged with enforcing the UDO, *see* UDO § 9.5.1., and is empowered to decide applications for interpretation of the UDO, *see* UDO § 2.4.16.

3. Effective 19 June 2020, the General Assembly consolidated the provisions governing planning and development regulations by local governments into a new Chapter 160D of the General Statutes. *See* An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, S.L. 2019-111 § 2; An Act to Complete the Consolidation of Land-Use Provisions Into one Chapter of the General Statutes as Directed by S.L. 2019-111, as Recommended by the General Statutes Commission, S.L. 2020-25 § 51(b).

¶ 20 "Generally, the petitioner's asserted errors dictate the scope of judicial review." *NCJS, LLC v. City of Charlotte*, 255 N.C. App. 72, 76, 803 S.E.2d 684, 688 (2017). "[I]f the petitioner contends the [b]oard's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the whole record test." *Id.* (quotation marks and citations omitted). In applying the whole record test, the "reviewing superior court sits in the posture of an appellate court and does not review the sufficiency of evidence presented to it but reviews that evidence presented" to the board. *Mann Media, Inc. v. Randolph Cnty. Plan. Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002) (quotation marks and citation omitted). The whole record test requires the superior court to "examine all competent evidence (the 'whole record') in order to determine whether the [board's] decision is supported by substantial evidence." *Id.* at 14, 565 S.E.2d at 17. "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion[.]" *Sun Suites Holdings, L.L.C. v. Bd. of Aldermen of Garner*, 139 N.C. App. 269, 273, 533 S.E.2d 525, 528 (2000). "The 'whole record' test does not allow the reviewing court to replace the board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Mann Media*, 356 N.C. at 14, 565 S.E.2d at 17-18 (citation omitted).

¶ 21 Where a party contends the board's decision was based on an error of law, *de novo* review is proper. *Id.* at 13, 565 S.E.2d at 17. Under *de novo* review, the superior court "consider[s] the matter anew[] and freely substitutes its own judgment for the agency's judgment." *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999).

¶ 22 A superior court may apply both the whole record test and *de novo* review in a single case, "but the standards are to be applied separately to discrete issues." *Sun Suites*, 139 N.C. App. at 273-74, 533 S.E.2d at 528 (citations omitted). This Court reviews a superior court's order reviewing a board's decision to determine "whether the superior court applied the correct standard of review" and "whether the superior court correctly applied that standard." *Myers Park Homeowners Ass'n, Inc. v. City of Charlotte*, 229 N.C. App. 204, 208, 747 S.E.2d 338, 342 (2013) (quotation marks, brackets, and citation omitted).

B. Superior Court's Articulated Standards of Review

¶ 23 **[1]** At the outset, Respondent argues that the superior court's order must be vacated for failure to articulate the standard of review it applied to each issue. We disagree.

¶ 24 When reviewing an order by a county board of adjustment, a superior court "must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17 (quotation marks and citations omitted). In this case, Petitioner alleged before the superior court that: the Board's decision to affirm the Letter was arbitrary and capricious; the Board's conclusion that only 234 campsites existed as of 1 January 2013 was arbitrary and capricious and was not supported by substantial, competent, and material evidence; the Board committed an error of law in concluding that Petitioner was permitted to modify existing facilities but not construct new facilities; and the Board's decision to affirm the Letter was an abuse of discretion.

¶ 25 The superior court's order specifically recites these allegations. The superior court's findings, along with its conclusion that "the Board of Adjustment's decision was arbitrary and capricious [and] not supported by substantial, competent and material evidence in view of the entire record as set forth above[,]" was sufficient information to reveal that the superior court applied the whole record test to Petitioner's arguments that the Board's decision to affirm the Letter was arbitrary and capricious and the Board's conclusion that only 234 campsites existed as of 1 January 2013 was arbitrary and capricious and was not supported by substantial, competent, and material evidence. Additionally, the superior court's order specifically articulated the *de novo* standard for Petitioner's argument that the Board committed an error of law in applying the UDO to the proposed improvements. It is evident that the superior court articulated the correct standard of review it applied to each issue.

C. Determination of the Number of Campsites

¶ 26 **[2]** Respondent argues that the superior court failed to correctly apply the whole record test in its review of the Board's conclusion that, as of 1 January 2013, 234 improved campsites and a number of tent campsites—determined by dividing the delineated tent camping area by 3,000 square feet—existed at the Campground. Respondent contends that there was substantial evidence in the record to support the Board's conclusion.

¶ 27 The Board found, in relevant part, as follows:

> 19. In 1996 and 1997, Hampton Lodge applied for two special event permits at which time they submitted a site plan of the campground. The site plan shows 234 campsites, 90 vehicular parking spaces

and an area for tent camping. The same site plan was submitted in 1996 and 1997.

20. The 96/97 site plan was used at Hampton Lodge to direct customers to campsite locations until the campground was sold to Sunny in 2018.

. . . .

25. The 96/97 site plan is the most competent evidence regarding the number of campsites that existed at Hampton Lodge on January 1, 2013.

26. The site plans submitted by Sunny demonstrate 392-700 "potential" campsites for Hampton Lodge, not existing campsites on January 1, 2013, as required by UDO 8.2.6.A.(5).

27. On January 1, 2013, there were 234 existing campsites and a designated area which was used for tent camping at Hampton Lodge.

28. The number of campsites within the tent camping area should be calculated based on the designated area for tent camping on a scaled version of the 96/97 site plan, divided by the minimum campsite size (3000 square feet) required by all zoning regulations prior to the 2013 UDO.

¶ 28 The Board's findings were supported by the 1996 and 1997 site plans. These site plans, submitted to county entities by previous owners of the campgrounds, each showed 234 campsites and a tent camping area. The Board found that these site plans were used until 2018 "to direct customers to campsite locations," a finding that is not specifically challenged by Petitioner and is therefore binding on appeal. *See Church v. Bemis Mfg. Co.*, 228 N.C. App. 23, 26, 743 S.E.2d 680, 682 (2013) ("Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal."). The Director also testified that when she visited the Campground in June 2018, the tent area was marked with a single sign and corresponded to the tent area shown on the 1996 and 1997 site plans. Because a "reasonable mind might accept" this evidence "as adequate to support" the Board's determination of the number of campsites, the Board's determination was supported by substantial evidence. *See Sun Suites*, 139 N.C. App. at 273, 533 S.E.2d at 528.

¶ 29 Petitioner argues that evidence in the record suggested a greater number of campsites than found by the Board. This evidence, Petitioner contends, supports the superior court's findings that 314 campsites for RV, trailer, or camper use, and 78 campsites for tent camping existed at the campground on 1 January 2013, and that "the property has potential, excluding wetland acreage, to be developed differently, and more intensely, than as proposed by Petitioner." While the court must take into account "contradictory evidence or evidence from which conflicting inferences could be drawn[,]" "[t]he 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo[.]" *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted).

¶ 30 Here, the Board's determination of the number of campsites was supported by substantial evidence. Although there was the evidence from which conflicting inferences could have been drawn, the superior court erred by replacing the Board's judgment with its own, even if "the court could justifiably have reached a different result had the matter been before it de novo[.]" *Id.* The superior court thus incorrectly applied the whole-record test to the issue of the number of campsites at the Campground on 1 January 2013.

D. Proposed Improvements to the Campground

¶ 31 **[3]** Respondent also contends that the superior court erred by reversing the Board's conclusion that the UDO prohibited certain of the proposed improvements to the campground. Respondent argues that the Board correctly concluded that both the general standards regarding nonconforming uses and the specific provisions concerning nonconforming campgrounds apply to Petitioner's proposed improvements.

¶ 32 Petitioner, on the other hand, argues that the superior court correctly reversed the Board's conclusion that the UDO prohibited certain of the proposed improvements to the campground, but erred by affirming the Board's conclusion that the pool was not a permissible improvement. Petitioner argues that only the specific provisions concerning nonconforming campgrounds in Chapter 8 control, and that the Board committed an error of law by applying the general standards of the UDO concerning nonconforming uses. In Petitioner's view, all of its proposed improvements are permitted under the UDO because they do not expand the Campground's land area or add to the number of campsites that existed on 1 January 2013.

¶ 33 The resolution of this dispute turns on the proper construction of Chapter 8 of the UDO. Chapter 8 of the UDO regulates nonconforming uses. While nonconforming uses "are allowed to continue, and are encouraged to receive routine maintenance[,]" UDO § 8.1.2., the "purpose and intent" of Chapter 8 "is to regulate and limit the continued existence" of nonconforming uses. UDO § 8.1.1. Non-conforming uses and structures "are not favored under the public policy of North Carolina, and zoning ordinances are construed against indefinite continuation of a non-conforming use." *Jirtle v. Bd. of Adjustment for the Town of Biscoe*, 175 N.C. App. 178, 181, 622 S.E.2d 713, 715 (2005) (quotation marks and citation omitted).

¶ 34 Section 8.2.3. provides general standards concerning the "[e]xpansion and [e]nlargement" of nonconforming uses:

> A. Except in accordance with this subsection, a nonconforming use shall not be enlarged, expanded in area, or intensified.
>
> B. An existing nonconforming use may be enlarged into any portion of the structure where it is located provided the area for proposed expansion was designed and intended for such use prior to the date the use became a nonconformity. In no instance shall a nonconforming use be extended to additional structures or to land outside the original structure.
>
> C. Open air uses that are nonconformities, including but not limited to outdoor sales areas, parking lots, or storage yards, shall not be extended to occupy more land area than that in use when the open air use became nonconforming.

U.D.O. § 8.2.3.

¶ 35 Chapter 8 also contains specific provisions governing nonconforming campgrounds. "Existing campgrounds may not be expanded to cover additional land area or exceed the total number of campsites that existed on January 1, 2013." UDO § 8.2.6.B.(1). "Modifications to existing campgrounds are permitted provided the changes do not increase the nonconformity with respect to the number of campsites that existed on January 1, 2013." UDO § 8.2.6.A.(5).

¶ 36 Ordinary principles of statutory construction apply to local zoning ordinances such as the UDO. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 303, 554 S.E.2d 634, 638

(2001). Generally, "when two statutes arguably address the same issue, one in specific terms and the other generally, the specific statute controls." *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 322, 735 S.E.2d 300, 305 (2012) (citations omitted). But our courts have also recognized that, where possible, general and specific provisions addressing the same subject "should be read together and harmonized[.]" *LexisNexis Risk Data Mgmt. v. N.C. Admin. Off. of Cts.*, 368 N.C. 180, 186, 775 S.E.2d 651, 655 (2015) (quotation marks and citations omitted).

¶ 37 Here, it is possible to construe the general provisions concerning nonconforming uses and the specific provisions concerning campgrounds harmoniously: Section 8.2.3. applies to all nonconforming uses, including nonconforming campgrounds, while section 8.2.6. imposes additional requirements on nonconforming campgrounds. Thus, modifications to a nonconforming campground may not result in it being "enlarged, expanded in area, or intensified[,]" UDO § 8.2.3.A., nor may modifications expand a campground beyond the land area or number of campsites existing as of 1 January 2013, UDO § 8.2.6.B.(1), or otherwise "increase the nonconformity with respect to the number of campsites that existed" on that date, UDO § 8.2.6.A.(5). This construction satisfies the "cardinal rule of statutory construction that significance and effect should . . . be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word." *State v. Williams*, 286 N.C. 422, 432, 212 S.E.2d 113, 120 (1975) (quotation marks and citation omitted).

¶ 38 Moreover, Petitioner's interpretation of Chapter 8 is contrary to the principle that "[a] construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 215, 388 S.E.2d 134, 140 (1990) (quoting *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975)). Petitioner's interpretation would allow any and all improvements to a nonconforming campground so long as they do not enlarge the campground's land area or number of campsites beyond that which existed on 1 January 2013 or otherwise change the campground to another nonconforming use under section 8.2.2. Under this interpretation, an owner could indefinitely extend the lifespan of a nonconforming campground by regularly upgrading the campground with new amenities. This would contradict the stated purposes of Chapter 8 to "regulate and *limit* the continued existence" of nonconforming uses, UDO § 8.1.1. (emphasis added), and promote the continued viability of a land use that the County has deemed "generally incompatible with the permitted uses in the district[,]" *see* UDO § 8.2.1. (defining nonconforming uses).

¶ 39 The Board's determination that "[t]he new facilities proposed by [Petitioner] qualify as an impermissible expansion, enlargement and intensification of a nonconforming use and are not permitted" was in accordance with law, consistent with the purpose and intent of UDO Chapter 8 regulating and limiting the continued existence of nonconforming uses, and properly preserved the legislative body's intent. The trial court did not err by affirming the Board's conclusion that the pool was not a permissible proposed improvement. However, the trial court erred by reversing the Board's conclusion that the remainder of the new facilities proposed by Petitioner are an impermissible expansion, enlargement, and intensification of a nonconforming use and are not permitted.

III. Conclusion

¶ 40 The superior court articulated the proper standard of review to apply to each issue on appeal.

¶ 41 The superior court incorrectly applied the whole record test to the Board's determination of the number of campsites on Petitioner's campground as of 1 January 2013 as the Board's decision concerning the number of campsites on the Campground was supported by substantial, competent evidence in view of the entire record.

¶ 42 The superior court correctly applied *de novo* review and properly affirmed the Board's conclusion that Petitioner's proposed swimming pool is an impermissible expansion, enlargement, and intensification of a nonconforming use and is not permitted under the UDO. The superior court incorrectly applied de novo review and erred by reversing the Board's conclusion that the remaining new facilities proposed by Petitioner are an impermissible expansion, enlargement, and intensification of a nonconforming use and are not permitted.

¶ 43 Accordingly, we affirm the portion of the superior court's order that affirms the Board's conclusion regarding the pool. We reverse the remainder of the superior court's order and remand this matter to the superior court to affirm the remainder of the Board's order. The net result is that the Board's order is affirmed.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge STROUD and Judge WOOD concur.

GRIBBLE v. BOSTIAN

[279 N.C. App. 17, 2021-NCCOA-423]

GLENDA K. GRIBBLE, PLAINTIFF
v.
CHARLES D. BOSTIAN, JR. AND WIFE ALMA JEAN BOSTIAN, DEFENDANTS

No. COA20-412

Filed 17 August 2021

1. Easements—appurtenant—expressly granted by deed—location left to later agreement—determination by court—evidentiary support

In an action to determine easement rights between owners of adjacent lots, there was ample evidence to support the trial court's findings of fact regarding the existence of an appurtenant easement, but not the location of the easement chosen by the court (in an area that neither party advocated for). Instead, the following evidence supported placing the easement along a dirt path: the deed conveying one portion of a property to defendant ("Tract 2," the dominant estate) expressly reserved a thirty-foot right-of-way across another portion of the property ("Tract 1," the servient estate) to enable users of Tract 2 to reach a public road; the deed left the location of the easement to be agreed upon later by the parties; at the time of the deed, there already existed a dirt path across Tract 1 which connected Tract 2 and the road; defendant's regular use of the dirt path for years after acquiring Tract 2 was acquiesced to by the owner of Tract 1; and no other portion of Tract 1 was used for ingress and egress by defendants.

2. Easements—appurtenant—expressly created by deed—easement right restricted—benefit only to one tract

In an action to determine easement rights between owners of adjacent lots, an appurtenant easement expressly created by deed across one tract to benefit a second tract (to enable users of the second tract to access a public road) did not create an easement right to access or benefit any other land adjacent to those two tracts.

3. Evidence—determination of easement rights—statements by deceased former property owner—Dead Man's Statute—waiver

In an action to determine easements rights between owners of adjacent lots, plaintiff waived application of the Dead Man's Statute where her counsel asked defendant repeatedly about conversations he had with the former (deceased) owner of both tracts. Further,

statements by the former owner were properly admitted, not only pursuant to Evidence Rule 804 as statements from an unavailable witness, but also as statements against the former owner's pecuniary interests (since the former owner acquiesced to defendant's use of a dirt path, across his property in order to reach a public road, as an easement).

Appeal by Plaintiff and Defendants from amended order entered 21 January 2020 by Judge Joseph N. Crosswhite in Rowan County Superior Court. Heard in the Court of Appeals 24 February 2021.

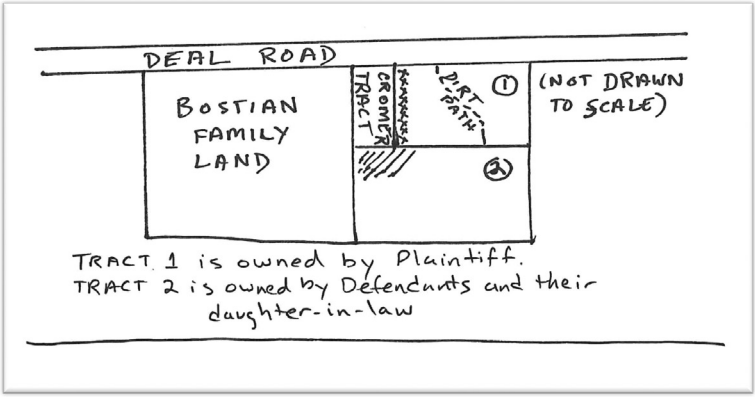
Hartsell & Williams, PA, by Austin "Dutch" Entwistle III, for the Plaintiff-Appellant.

Shelby, Pethel, and Hudson, P.A., by John T. Hudson, for the Defendants-Appellees.

DILLON, Judge.

¶ 1 Plaintiff and Defendants own adjoining tracts of land, which are the subjects of this action. Specifically, Plaintiff owns the tract labeled as Tract 1 on the map below; Defendants own Tract 2. Plaintiff's tract abuts a public road, while Defendants' tract does not. The issues in this case are whether Defendants have easement rights over Plaintiff's tract to access the public road and, if so, where is the location of said easement on Plaintiff's tract. The matter was tried without a jury. The background contained herein reflects the findings as made by the trial judge. The map below is provided for a better understanding of the trial court's findings.

¶ 2 Prior to 1991, the tracts below labeled as Tract 1, Tract 2, and the Cromer Tract were all part of a single tract owned by Plaintiff's father, Glenn Smith. The tract labeled as the "Bostian Family Land" was owned by various members of the family of Defendant Charles D. Bostian. By 1991, Mr. Bostian took title to a portion of the Bostian Family Land adjacent to Tract 2.



¶ 3 The "dirt path" as depicted on the map running through Tract 1 identifies the approximate location of a dirt path that Mr. Smith used for decades to access the rear portion (the area labeled "Tract 2") of his property.

¶ 4 In 1991, Mr. Smith conveyed to Mr. Bostian by deed (the "1991 Deed") the rear portion of his large tract, specifically the area labeled as Tract 2. The 1991 Deed also contained language granting Mr. Bostian an easement across Mr. Smith's remaining land (labeled as Tract 1) at a location *to be agreed upon* by Mr. Bostian and Mr. Smith, as follows:

> Together with a right-of-way thirty (30) feet in width running from Deal Road to this property, the exact location of said right-of-way to be agreed upon between the parties or their successors and assigns.

¶ 5 Over the next fourteen years, between 1991 and 2005, Mr. Smith and Mr. Bostian never agreed in writing where the easement referenced in the 1991 Deed would be located. The trial court did not make any findings as to whether Mr. Smith and Mr. Bostian expressly orally agreed as to the easement location. (The evidence was conflicting as to whether they had orally agreed that the dirt path would serve as the easement.) In any event, Mr. Bostian began and continued to utilize the dirt path to access Tract 2 from Deal Road. Mr. Smith acquiesced to Mr. Bostian's use of the dirt path, never complaining or objecting. There is no evidence that Defendants ever used any other portion of Tract 1 as an easement to access Tract 2. Further, there was no evidence offered by either party that the easement was at a location on Tract 1 other than along the dirt path.

¶ 6 In 2005, Mr. Smith died. Plaintiff inherited Tract 1, the tract where the dirt path is located, from her father Mr. Smith.[1] Plaintiff desired to sell Tract 1 but learned that potential buyers were deterred by the existence of a dirt path running through the middle of that tract. One day after her father's funeral, Plaintiff placed posts to block the dirt path. These posts were quickly removed after Defendants complained, claiming to have easement rights in the dirt path.

¶ 7 At some later point, Defendants' daughter-in-law, who is not a party to this appeal, came to own a portion of Tract 2, specifically the area on Tract 2 labeled with the slanting lines.

¶ 8 In 2018, Plaintiff commenced this matter to resolve the easement dispute. Following a bench trial, the trial court entered its Amended Order, determining that Plaintiff's Tract 1 is burdened by an appurtenant easement in favor of Tract 2.[2] However, the trial court did not determine that the easement was located along the existing dirt path. Rather, the trial court determined that the location of the easement would be along Tract 1's boundary with the Cromer Tract, in the area labeled by the x's ("xxxxx") on the above map, notwithstanding that no party ever advocated for this location nor was there any evidence that Defendants or anyone ever used this location to access Tract 1. Plaintiff and Defendants each noticed an appeal.

I. Standard of Review

¶ 9 The standard of review from a bench trial is whether there exists competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013). Since the trial judge acts as the factfinder, the trial court resolves any conflicts in the evidence; any findings made by the trial judge are binding on appeal if supported by competent evidence. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). "Conclusions of law drawn by the trial judge from the findings of fact are reviewable de novo on appeal." *Humphries v. Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

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1. Plaintiff did not inherit the portion of land labeled as the Cromer Tract. Rather, at some point before his death, Mr. Smith conveyed the Cromer Tract to Michael Cromer. This Cromer Tract is not relevant to the present dispute between Plaintiff and Defendants.

2. The original order was improperly titled "Plaintiff's Trial Brief," so the court filed an Amended Order to correct its scrivener's error.

II. Analysis

¶ 10 For the reasons stated below, we conclude that the trial court's findings support the portion of its Amended Order determining that Defendants have easement rights across Plaintiff's tract to access the tract conveyed to Mr. Bostian in 1991. However, we further conclude that the trial court's findings do not support the portion of its Amended Order determining *the location* of the easement to be along the edge of Tract 1. The findings only support a determination that the easement is located along the dirt path. We modify the trial court's Amended Order accordingly.

¶ 11 By locating the easement along the edge of Plaintiff's tract—a location no one advocated for and for which no evidence was offered—it appears that the trial court sought to achieve a compromise by recognizing an easement in favor of Defendants, but in a way that would cause Plaintiff minimal economic harm. However, we must follow the law; and the law requires that the facts, as found by the trial court, must lead to the conclusion that the dirt path is the easement.

A. Mr. Smith's 1991 Deed Created an Express Easement Along the Dirt Path

¶ 12 **[1]** Our courts have taken a lenient approach in recognizing easements that are expressly granted but where the grant does not expressly state the easement's precise location on the servient estate. Our Supreme Court has long held that the Statute of Frauds is satisfied so long as the dominant and servient estates are identified and the *nature* of the easement is sufficiently described in the writing:

> No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, provided the language is certain and definite in its terms[.]
>
> The instrument should describe with reasonable certainty the easement created and the dominant and servient tenements.

Hensley v. Ramsey, 283 N.C. 714, 730, 199 S.E.2d 1, 10 (1973) (citation omitted). That Court has held that where the location of the easement itself is not expressed in the grant, its location is established when the owner of the dominant estate makes reasonable use of a portion of the servient estate for ingress and egress, and this use is acquiesced to by the owner of the servient estate:

> It is a settled rule that where there is no express agreement with respect to the location of a way granted but not located, the practical location and use of a reasonable way by the grantee, acquiesced in by the grantor or owner of the servient estate, sufficiently locates the way, which will be deemed to be that which was intended by the grant.

Borders v. Yarbrough, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953). This holding was reaffirmed by that Court in *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 269-70, 192 S.E.2d 449, 455 (1972).

¶ 13 Our Supreme Court later held that the subsequent owner of the servient tract (such as Plaintiff in the present case) is bound as to the location of the easement where that location was acquiesced to by her predecessor in title (Plaintiff's father in this case) who created the easement:

> The use of roads in question by [the owners of the dominant estate], acquiesced in by [the] predecessors in title of the servient estate, sufficiently locates the roads on the ground, which is deemed to be that which was intended by the reservation of the easements.

Allen v. Duvall, 311 N.C. 245, 251, 316 S.E.2d 267, 271 (1984) (citing *Borders*, 237 N.C. at 542, 75 S.E.2d at 543).

¶ 14 In the present case, the trial court found facts amply supported by the evidence,[3] as follows: Mr. Smith executed the 1991 Deed conveying the rear portion of his tract to Defendants. For decades prior to 1991, the dirt path was located on Mr. Smith's land and was used to access the rear portion of his tract from Deal Road. The 1991 Deed contains language identifying the dominant tract being conveyed (Tract 2) and the servient estate (Mr. Smith's retained land (Tract 1)), and the nature of the easement being granted (a 30-foot-wide easement running from Deal Road to the dominant estate being conveyed). The 1991 Deed does not expressly identify the exact location of the easement being granted but contemplates that the parties would later agree as to the location. Although the parties never entered into any written agreement regarding the location of the easement, Mr.

3. Plaintiff argues that the trial court erred by admitting evidence concerning statements made by Mr. Smith, in violation of the Dead Man's Statute and the Rules of Evidence. We disagree, but even if the trial court did err, there is still considerable evidence outside the testimony to support our conclusion.

Bostian began to use and continued to use the dirt path to access his dominant estate from the time Mr. Smith conveyed that tract to him until Mr. Smith's death. Mr. Smith acquiesced to Mr. Bostian's use of the dirt path for ingress and egress. And when Defendants finished paying for Tract 2, Mr. Smith had a survey prepared showing the dirt path leading from Deal Road to Tract 2, with no other easement leading to Tract 2 from Deal Road.

¶ 15 There was no evidence offered or finding made that Mr. Bostian ever used, or that he and Mr. Smith ever discussed him using, the area that the trial court ultimately determined to be the location of the easement (labeled by the x's). This location was apparently picked by the trial court on its own. In fact, the record reveals no evidence offered or finding made that any portion of the servient estate that Plaintiff now owns, other than the dirt path, was ever used by Defendants for ingress and egress to their dominant estate.

¶ 16 Following our Supreme Court precedent, we must conclude that the findings of the trial court compel a judgment that the dirt path located on Tract 1 constitutes an appurtenant easement for the benefit of Tract 2.

B. The Dirt Path Easement Benefits Only Tract 2

¶ 17 **[2]** We are cognizant that Mr. Bostian also owns part of the "Bostian Family Land" tract, adjacent to his Tract 2. However, following our Supreme Court precedent, we conclude that the easement granted by Mr. Smith in his 1991 Deed only grants Mr. Bostian (and his successors in title to Tract 2) the right to use the dirt path to access Tract 2; the grant did not create easement rights to access any other land, including the Bostian Family Land. Specifically, our Supreme Court has held that:

> One having a right of way appurtenant to certain land cannot use it for the benefit of other land to which the right is not attached, [even if] such land is within the same inclosure with that to which the easement belongs[.]
>
> * * *
>
> The way is granted for the benefit of the particular land, and its use is limited to such land. Its use cannot be extended to other land . . . without the consent of the owner of the servient estate.

Wood v. Woodley, 160 N.C. 17, 19-20, 75 S.E. 719, 720 (1912); *see Hales v. R.R.*, 172 N.C. 104, 107, 90 S.E. 11, 12 (1916) ("[A]n easement of right

of way over another's property is appurtenant to the particular piece of ground of the dominant owner with which it is granted, and is not personal to the owner, [and he is not] authoriz[ed] to use it in connection with other real estate he may own abutting the right of way."); *see also Meyers v. Reaves*, 193 N.C. 172, 178, 136 S.E. 561, 564 (1927) ("One having a right of way appurtenant to certain land cannot use it for the benefit of other land to which the right is not attached[.]").

C. Evidentiary Analysis

¶ 18 **[3]** Plaintiff takes issue with many of the evidentiary determinations made by the trial court, arguing that there were violations of the Dead Man's Statute and the North Carolina Rules of Evidence, prohibiting certain hearsay evidence of what Mr. Smith, now deceased, might have said concerning certain matters.

¶ 19 Our resolution of this appeal does not rely on what Mr. Smith might have said, but rather is supported by the other evidence. Notwithstanding, we conclude that Plaintiff waived application of the Dead Man's Statute by opening the door to the testimony regarding what Mr. Smith might have said. *See Davison v. Land Co.*, 126 N.C. 704, 708, 36 S.E. 162, 163 (1900). Specifically, Plaintiff's counsel asked Mr. Bostian repeatedly about conversations he had with Mr. Smith. Further, to the extent that Mr. Smith's statements offered at trial constituted hearsay, these statements fall within an exception that allows into evidence statements made by an unavailable witness. N.C. Gen. Stat. § 8C-1, Rule 804 (2018) (a witness is "unavailable" because he is "unable to be present or to testify at the hearing because of death[.]"). Further, when a declarant is unavailable, "North Carolina cases have recognized declarations against pecuniary or proprietary interest as an exception to the hearsay rule." *See* Brandis on North Carolina Evidence § 147 (1982). Any statement by Mr. Smith which would tend to show that he acquiesced to the dirt path being the easement—a path that runs through the middle of the tract—would have been against his pecuniary interests.

III. Conclusion

¶ 20 We affirm the portion of the trial court's Amended Order determining that Defendants have appurtenant easement rights across Plaintiff's tract to access the tract Mr. Bostian acquired from Mr. Smith in 1991.

¶ 21 We modify the portion of the trial court's Amended Order locating the easement along the edge of Tract 1 following its boundary with the Cromer Tract. We declare, based on the trial court's findings of fact, that the easement location is a thirty-foot wide path that includes the dirt

path that Defendants have been using which runs through the middle of Plaintiff's tract, a use that was acquiesced to by Mr. Smith.

AFFIRMED IN PART, MODIFIED IN PART.

Judges INMAN and JACKSON concur.

STATE OF NORTH CAROLINA
v.
LA-AMEL CLARENCE McDOUGALD

No. COA20-514

Filed 17 August 2021

1. Criminal Law—motion for mistrial—testimony that defendant's photo came from jail archives—prejudice analysis—curative jury instruction

The trial court did not abuse its discretion by denying defendant's motion for a mistrial after a jury found defendant guilty of robbery with a dangerous weapon. Defendant was not prejudiced by a detective's testimony that photos of defendant used in a photographic lineup came from "jail archives," since the testimony was not specific and did not amount to evidence that defendant had committed another crime. Moreover, any error was cured by the trial court's immediate instruction to the jury to disregard the detective's statement.

2. Constitutional Law—effective assistance of counsel—direct appeal—dismissed without prejudice

Defendant's ineffective assistance of counsel claim on direct appeal from his conviction for robbery with a dangerous weapon was dismissed without prejudice where the cold record was insufficient for the appellate court to determine whether counsel's performance in failing to challenge a photographic lineup was deficient.

Judge MURPHY concurring in part and concurring in result only in part by separate opinion.

Appeal by Defendant from final judgment entered 18 November 2019 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexander G. Walton, for the State-Appellee.

Unti & Smith, PLLC by Sharon L. Smith for the Defendant.

CARPENTER, Judge.

¶ 1 La-Amel Clarence McDougald ("Defendant") appeals the trial court's denial of his motion for a mistrial and the judgment entered 18 November 2019, after a jury found him guilty of robbery with a dangerous weapon. Defendant also appeals on the basis of Ineffective Assistance of Counsel ("IAC"). We find the trial court did not err in denying the motion for mistrial; accordingly, we affirm the trial court and dismiss Defendant's IAC claim without prejudice.

I. Factual Background and Procedural History

¶ 2 Gary McLean ("Mr. McLean") owned a video game store in Red Springs, North Carolina. While working at his store on 1 April 2017, Mr. McLean became the victim of an armed robbery. Mr. McLean testified an SUV arrived at the store and two men jumped out, one wearing a mask and the other not wearing a mask. The unmasked man confronted Mr. McLean with an assault rifle; told him to get on the ground; and took his wallet, cell phone, and approximately $400 in cash. Mr. McLean reported the robbery to the Robeson County Sheriff's Office and identified Defendant as one of the assailants from a photographic lineup shown to him by Detective Craig Smith.

¶ 3 Defendant was tried in Superior Court on 18 November 2019 on one count of conspiracy to commit robbery with a dangerous weapon and one count of robbery with a dangerous weapon. At trial, Detective Smith testified he prepared the photographic lineup by accessing photos from the "jail archives." Defendant's trial counsel objected to Detective Smith's testimony concerning the photographic lineup, contending the testimony unfairly prejudiced Defendant. The trial court sustained the objection and instructed the jury, "the objection is sustained . . . [y]ou are not to consider the last response of the witness at this time as evidence." Defendant testified that he was present at the scene to "buy some pills," but denied taking part in the robbery. On cross-examination, Defendant admitted to multiple criminal convictions including common law robbery, felony assault inflicting serious bodily injury, and one count of possession of firearm by a felon. Defense counsel later made a motion for mistrial, which was denied. The trial court dismissed the conspiracy charge upon Defendant's motion at the close of the State's evidence, but

the jury found Defendant guilty of robbery with a dangerous weapon. Defendant gave oral notice of appeal in court on 19 November 2019.

II. Jurisdiction

¶ 4 This Court has jurisdiction over the final judgment entered by the trial court on 18 November 2019 under N.C. Gen. Stat. § 7A-27(b)(1) (2019) and N.C. Gen. Stat. § 15A-1444(a) (2019).

III. Issues

¶ 5 The issues presented on appeal are: (1) whether the trial court erred in denying Defendant's motion for a mistrial after Detective Smith testified the photographs used in the jail lineup were obtained from "jail archives"; and (2) whether Defendant's Sixth Amendment right to effective assistance of counsel was violated when his counsel failed to challenge the photographic lineup's compliance with the Eyewitness Identification Reform Act ("EIRA").

IV. Analysis

A. Denial of Defendant's Motion for Mistrial

¶ 6 **[1]** Defendant argues the trial court improperly denied his motion for mistrial because the court's instruction to the jury on Detective Smith's testimony was insufficient to cure its prejudicial effect. Accordingly, Defendant argues the trial court abused its discretion in denying the motion for mistrial. We disagree.

1. Standard of Review

¶ 7 This Court reviews a trial court's denial of a motion for mistrial under an abuse of discretion standard. *State v. Simmons*, 191 N.C. App. 224, 227, 662 S.E.2d 559, 561 (2008).

2. Discussion

¶ 8 The trial court "*may* declare a mistrial at any time during the trial," but the court "*must* declare a mistrial upon the defendant's motion if there occurs during the trial an error . . . resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2019) (emphasis added). Whether a defendant's case has been irreparably and substantially prejudiced is a decision within the "sound discretion" of the trial court and will not be disturbed absent an abuse of discretion. *See State v. Williamson*, 333 N.C. 128, 138, 423 S.E.2d 766, 772 (1992) ("The decision of the trial judge is entitled to great deference since he is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable.").

¶ 9 In determining the prejudicial effect of evidence, this Court looks to "the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict." *State v. Aycoth*, 270 N.C. 270, 272, 154 S.E.2d 59, 60 (1967). "When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991). However, some instructions from a trial court are insufficient to cure prejudice. *See Aycoth*, 270 N.C. at 272-73, 154 S.E.2d at 60-61, citing *State v. Aldridge*, 254 N.C. 297, 118 S.E.2d 766 (1961) ("Whether the prejudicial effect of such incompetent statements should be deemed cured by such instructions depends upon the nature of the evidence and the circumstances of the particular case."). Thus, we first address whether Defendant was prejudiced by Detective Smith's testimony, and second, address whether the trial court's instruction to the jury was curative.

a. Prejudicial Nature of Detective Smith's Testimony

¶ 10 At trial, Detective Smith testified the photographs used in compiling the photographic lineup were obtained from the "jail archives." Defendant specifically argues this testimony was prejudicial, as it "directly informed the jury [Defendant] had previously been arrested" and had a criminal history. Defendant argues this testimony is analogous to the testimony in *State v. Aycoth*, 270 N.C. 270, 154 S.E.2d 59 (1967), and thus a motion for mistrial should have been granted. We disagree.

¶ 11 In *Aycoth*, the North Carolina Supreme Court recognized that, generally, in a prosecution for a particular crime "the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." *Id.* at 272, 154 S.E.2d at 60. The Court further recognized that in some instances, because of the "serious character and gravity of the incompetent evidence," it is difficult for the jury to erase it from their minds. *Id.* at 272, 154 S.E.2d at 60. In *Aycoth*, a witness for the State testified the car he saw at the scene of the crime belonged to the defendant because it was the same car the defendant drove when he was arrested for murder. *Aycoth*, 270 N.C. at 272, 154 S.E.2d at 60. The *Aycoth* Court held such testimony was prejudicial as it suggested to the jury the defendant committed murder, and the trial court could not proceed without material prejudice to the defendant. *Id.* at 273, 154 S.E.2d at 61. Accordingly, the Court reversed the trial court's denial of a motion for mistrial. *Id.* at 273, 154 S.E.2d at 61.

¶ 12 The testimony in this case is distinguishable from the testimony in *Aycoth*. Detective Smith testified the pictures he used for the photographic lineup were obtained from the "jail archives," whereas the witness in

Aycoth specifically testified that the defendant had been arrested for murder. *See Aycoth*, 270 N.C. at 272, 154 S.E.2d at 60. In the case at bar, Detective Smith's testimony is not specific and does not amount to evidence "tending to show that the accused has committed another distinct, independent, or separate offense." *Aycoth*, 270 N.C. at 272, 154 S.E.2d at 60. Detective Smith's testimony did not "directly inform[] the jury that [Defendant] had previously been arrested," as Defendant claims.

¶ 13 Further, in *State v. Moore*, the Supreme Court did not overturn a trial court's denial of a motion for mistrial after a witness testified Moore had previously "killed one person," and the trial court instructed the jury not to consider that testimony. *State v. Moore*, 276 N.C. 142, 148, 171 S.E.2d 452, 457 (1970). In response to numerous questions, a witness stated four times that he knew Moore "killed one person." *Id.* at 148, 171 S.E.2d at 457. The *Moore* Court held the defendant was not prejudiced as the testimony did not suggest that he had been arrested, tried, or convicted. *See Moore*, 276 N.C. at 149, 171 S.E.2d at 458 (holding the question "was the killing accidental, in self-defense, or felonious?" contained no suggestion the homicide was the result of a criminal act or that defendant had been prosecuted for it.). Similarly, in this case, Detective Smith testified the photographs for the lineup were from the "jail archives," and there was no mention of Defendant's arrests, convictions, or other criminal history. *See Moore*, 276 N.C. at 149, 171 S.E.2d at 457. The testimony at issue in the case at bar is more indefinite than the testimony in *Moore*. *See Moore*, 276 N.C. at 148, 171 S.E.2d at 457. Therefore, we hold Defendant was not prejudiced by the testimony.

¶ 14 Additionally, if there was any difficulty for the jurors to erase from their mind the fact of Defendant's criminal history, *see Aycoth*, at 272, 154 S.E.2d at 60, Defendant created the difficulty himself. In *Moore*, the Supreme Court held there were no subsequent statements at trial that emphasized the witness's inconclusive testimony that Moore "killed one person." *Moore*, 276 N.C. at 147, 171 S.E.2d at 457. Here, the only statements that directly informed the jury of Defendant's criminal history were made by Defendant himself on both direct and cross-examination. Thus, Defendant was not prejudiced by Detective Smith's testimony.

b. Curative Nature of Trial Court's Instruction

¶ 15 Notwithstanding our holding the testimony was not prejudicial, we address the curative nature of the trial court's instruction to the jury. Defendant argues the trial court's instruction to the jury to "not consider the last response of the witness at this time as evidence," was vague and insufficient to cure the prejudice of Detective Smith's testimony. We disagree.

¶ 16 Ordinarily, when a trial court instructs the jury not to consider prejudicial evidence, the prejudice is cured. *See State v. Black*, 328 N.C at 200, 400 S.E.2d at 404. North Carolina courts have long recognized the presumption jurors will understand and comply with those instructions. *See State v. Self*, 280 N.C. 665, 672, 187 S.E.2d 93, 97 (1972) ("[O]ur system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so.") *citing Wilson v. Branning Mfg. Co.*, 120 N.C. 94, 26 S.E. 629 (1897)). Further, this Court has recognized instructions as curative when counsel immediately objects, and the trial court sustains the objection and issues a curative instruction. *See State v. Sheridan*, 263 N.C. App. 697, 705, 824 S.E.2d 146, 153 (2019) (holding after defense counsel's immediate objection, which was sustained, the trial court gave a sufficiently curative instruction to the jury by stating: "with regard to the last remark by this witness you are to disregard that remark and not consider it as part of your consideration towards a deliberation to a verdict in this case.").

¶ 17 In the case *sub judice*, following Detective Smith's testimony regarding the photos used in the photographic lineup, defense counsel objected and the objection was sustained. The trial court then instructed the jury: "the objection is sustained . . . [y]ou are not to consider the last response of the witness at this time as evidence." Here, the similarity to the instruction in *Sheridan* is compelling. *See id.*, 263 N.C. App. at 705, 824 S.E.2d at 153. Therefore, we hold the trial court's instruction to the jury cured any prejudice of Detective Smith's testimony. Further, we must respect the presumption the jurors both understood and complied with those instructions. *See State v. Self*, 280 N.C. at 672, 187 S.E.2d at 97.

¶ 18 Detective Smith's testimony was not prejudicial and the trial court's instruction cured any prejudice to Defendant from that testimony. Accordingly, we hold the trial court did not abuse its discretion by denying the Defendant's motion for a mistrial.

B. Ineffective Assistance of Counsel

¶ 19 **[2]** Defendant next argues that his counsel's failure to challenge the photographic lineup's compliance with the Eyewitness Identification Reform Act violated his Sixth Amendment right to effective assistance of counsel.

1. Standard of Review

¶ 20 This Court reviews claims of the ineffective assistance of counsel ("IAC") *de novo*. *State v. Fisher*, 318 N.C. 512, 531-34, 350 S.E.2d 334, 345-47 (1986). To establish a claim for IAC, a defendant first must prove counsel's performance was "deficient," meaning counsel functioned below an "objective standard of reasonableness" under prevailing professional norms. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006); *citing Strickland v. Washington*, 466 U.S. 668, 697-98, 104 S.Ct. 2052, 2069 (1984). Secondly, a defendant must prove the deficient performance prejudiced him, meaning there is a "reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Allen* 360 N.C. at 316, 626 S.E.2d at 286 (*quoting Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. at 2068).

2. Discussion

¶ 21 Defendant argues counsel's failure to challenge the photographic lineup's compliance with the EIRA amounted to deficient performance. The EIRA requires photographic lineups to be administered by an "independent administrator," meaning someone "who is not participating in the investigation . . . and is unaware of which person in the lineup is the suspect." N.C. Gen. Stat. § 15A-284.52 (2019). Defendant argues that if a motion to suppress the photographic lineup had been filed, or if defense counsel challenged Detective Smith on cross-examination, this would have triggered the mandated jury instruction under N.C. Gen. Stat. § 15A-284.52(d)(3).

¶ 22 IAC claims are proper to address on direct appeal "when the cold record reveals that no further investigation is required." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 524 (2001). However, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (*citing State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985)). Further, if certain evidentiary issues may need to be developed, this Court should dismiss the IAC claim without prejudice to Defendant's right to reassert it in a Motion for Appropriate Relief. *See State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) ("should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [Motion for Appropriate Relief] proceeding.").

¶ 23 In this case, we cannot properly assess the IAC claim on direct appeal because there has been no evidentiary hearing on this issue, and

the "cold record" is not dispositive. *See State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985) (concluding same); *Fair*, 354 N.C. at 166, 557 S.E.2d at 524 (citations omitted) (Ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing."); *State v. House*, 340 N.C. 187, 196, 456 S.E.2d 292, 297 (1995) (declining to adjudicate ineffective assistance of counsel claim where record was silent as to whether defendant consented to his counsel's argument regarding his guilt and determining that said issue was appropriately deferred for consideration in a motion for appropriate relief). Therefore, we dismiss Defendant's IAC claim without prejudice to his right to file a Motion for Appropriate Relief in the trial court.

¶ 24 Should this issue be raised below in a Motion for Appropriate Relief, the trial court may "take evidence, make findings of fact and conclusions of law, and order review of all files and oral thought patterns of trial counsel and client that are determined to be relevant to defendant's allegations of ineffective assistance of counsel." *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000).

V. Conclusion

¶ 25 We hold the trial court did not abuse its discretion in denying Defendant's motion for a mistrial. The testimony of Detective Smith was not prejudicial to Defendant, and even if it was, the trial court's instruction was curative. Moreover, we dismiss Defendant's IAC claim without prejudice to his right to reassert the claim in a motion for appropriate relief.

NO PREJUDICIAL ERROR IN PART AND DISMISS IN PART.

Judge DIETZ concurs.

Judge MURPHY concurs in part and concurs in result only in part.

MURPHY, Judge, concurring in part and concurring in result only in part.

¶ 26 I cannot join with the Majority in its determination in Part IV(A)(2)(a), specifically that "Defendant was not prejudiced by the testimony [that his photo was available as part of the jail records]." *Supra* at ¶ 13.

The testimony in this matter was of the same substance as the witness's testimony in *Aycoth* regarding "when [the defendant] was indicted for murder."[1] *State v. Aycoth*, 270 N.C. 270, 272, 154 S.E.2d 59, 60 (1967). "The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." *Id.* (marks omitted). Similar to the improper testimony in *Aycoth*, the testimony informed the jury that Defendant had a criminal history of some sort. As a result, Defendant was prejudiced by this testimony.

¶ 27 However, as instructed by our Supreme Court in *Aycoth* and throughout our jurisprudence, as properly noted by the Majority, "Ordinarily where the evidence is withdrawn no error is committed. . . . Whether the prejudicial effect of such incompetent statements should be deemed cured by such instructions depends upon the nature of the evidence and the circumstances of the particular case." *Id.* at 272-273, 154 S.E.2d at 61 (citations omitted); *see supra* at ¶ 16. While I do not join the Majority in holding Defendant was not prejudiced by this testimony, I do join the Majority in its prejudice analysis in Part IV(A)(2)(b). *Supra* at ¶¶ 15-18. As a result, I concur in the result reached regarding the trial court's denial of Defendant's motion for a mistrial. I otherwise join the Majority's opinion in full.

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1. The Majority mistakenly refers to the defendant in *Aycoth* having been "arrested for murder," rather than having been "indicted for murder." *Supra* at ¶¶ 11, 12; *State v. Aycoth*, 270 N.C. 270, 272, 154 S.E.2d 59, 60 (1967). Admittedly, the testimony in *Aycoth* regarding an arrest may be referring to the indicted murder, but the recitation of the testimony leaves this ambiguous. *See id.*

STATE OF NORTH CAROLINA
v.
DEMERY BERNARD McLYMORE

No. COA20-555

Filed 17 August 2021

Criminal Law—jury instructions—robbery with a dangerous weapon—no designation of victims named in indictment

The trial court did not err, much less commit plain error, by instructing the jury on the elements of robbery with a dangerous weapon without naming the two individuals listed in the indictment as the alleged victims. The evidence supported the elements of the offense with regard to at least one of the two named victims, both of whom testified at trial and identified defendant in court, and did not support a verdict of guilty to robbery with a firearm with regard to any other person who defendant interacted with during his crime spree.

Appeal by Defendant from judgment entered 23 October 2019 by Judge Michael A. Stone in Sampson County Superior Court. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew Baptiste Holloway, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Demery Bernard McLymore appeals from judgment entered upon a jury verdict of guilty of one count of robbery with a dangerous weapon. Defendant argues that the trial court plainly erred by failing to designate in the robbery with a firearm[1] jury instruction the two

1. Where an individual is charged with robbery with a dangerous weapon and the alleged dangerous weapon is a firearm, the jury is instructed with North Carolina Pattern Jury Instruction 217.20, robbery with a firearm. Where an individual is charged with robbery with a dangerous weapon, and the alleged dangerous weapon is something other than a firearm, the jury is instructed with North Carolina Pattern Jury Instruction 217.30, robbery with a dangerous weapon – other than a firearm. We will refer to the charge in this case as robbery with a dangerous weapon and the jury instruction as robbery with a firearm.

individuals named in the indictment as the alleged victims, allowing the jury to convict Defendant of an offense unsupported by the indictment. We discern no error and accordingly, no plain error.

I. Factual and Procedural Background

¶ 2 On 13 March 2017, Defendant was indicted for robbery with a dangerous weapon; the indictment named Elijah Bryant and Shalik Generette as the victims.[2] After a jury trial, the jury returned its verdict on 23 October 2019, finding Defendant guilty of robbery with a dangerous weapon. That same day, the trial court entered judgment on the verdict and sentenced Defendant to 128-166 months in prison. Defendant gave proper oral notice of appeal in open court.

¶ 3 The evidence presented a trial tended to show the following: On 3 September 2016, around 7:00 PM, Yvette Spinks was walking towards the Sampson Homes housing complex in Clinton, North Carolina. Defendant approached Yvette, pulled out a handgun and waved it towards her, and said, "give me what you've got." Yvette did not have anything on her, and Defendant did not take anything from her.

¶ 4 Later that evening, at approximately 9:00 PM, Tevin Bryant and Desean McLean stopped at a convenience store in Clinton. Tevin remained in the truck and Desean went inside the store. Defendant approached the truck and asked Tevin for a ride to his girlfriend's residence in the Sampson Homes housing complex. Desean returned to the truck and agreed to give Defendant a ride. Defendant got into the back seat where Desean had a loaded shotgun.

¶ 5 Upon arriving at Sampson Homes, Defendant got out of the truck but claimed that he had lost his pistol somewhere inside the truck. As Tevin and Desean helped Defendant look for his pistol, Defendant grabbed Desean's shotgun from the back seat. Defendant threatened to kill Desean unless Tevin followed him, and Defendant told Tevin to "[s]hut up for I kill you."

¶ 6 Defendant forced Tevin to walk with him. When they approached two boys, Elijah Bryant and Shalik Generette, Defendant stated, "Y'all going to need to stop walking or we going to blow your back out." Defendant told Tevin to search Elijah and Shalik, and stated that he would kill Tevin and the boys if they did not obey. Defendant and Tevin searched the boys' pockets and wrists, and Defendant took approximately $40.00 and

2. A second count of robbery with a dangerous weapon naming a different victim was dismissed prior to trial.

a pocketknife from Elijah. After taking the money and knife from Elijah, Defendant and Tevin ran away; the boys ran to a relative's home to call the police.

¶ 7 That same evening, around 11:00 PM, Sergeant Matthew Bland of the Clinton Police Department arrived at Sampson Homes "in reference to a female being assaulted at that time." Bland discovered that the incident involved Yvette and he "made contact with [Yvette] to find out what had occurred." Bland then saw a man walking away from him at a quick pace while "carrying what appeared to be a shotgun[.]"

¶ 8 Bland's search for the man carrying the shotgun led him to a nearby residence, which he obtained permission to search. Bland found Defendant in one of the bedrooms. When Bland searched Defendant, he found a little more than $32, a pocketknife, a red and gold shotgun shell, a watch, and unspent bullets which could be used in a handgun. A short time later, Bland recovered a pump shotgun from the residence's backyard. Defendant was arrested and taken into custody. A few hours later, in the early morning hours of 4 September 2016, Bland interviewed Elijah and Shalik. Both boys provided descriptions of the man who had held them at gunpoint. Both descriptions matched Defendant.

II. Discussion

A. Standard of Review

¶ 9 As a threshold matter, the State argues that Defendant waived his right to all appellate review of the jury instruction because Defendant "did not object at trial to the armed robbery instruction despite at least three opportunities to do so," "consented to the form of the instruction," and "invited the error he complains of[.]" This argument has been rejected by our appellate courts under similar factual circumstances.

¶ 10 In *State v. Harding*, 258 N.C. App. 306, 813 S.E.2d 254 (2018), "[t]he State argue[d] that defendant [wa]s precluded from plain error review in part under the invited-error doctrine because he failed to object, actively participated in crafting the challenged instruction, and affirmed it was 'fine.' " *Id.* at 311, 813 S.E.2d at 259. Concluding that defendant's argument was reviewable for plain error, this Court explained:

> Even where the "trial court gave [a] defendant numerous opportunities to object to the jury instructions outside the presence of the jury, and each time [the] defendant indicated his satisfaction with the trial court's instructions," our Supreme Court has not

> found the defendant invited his alleged instructional error but applied plain error review.

Id. (citing *State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001) (alterations in original)).

¶ 11 Similarly, in *State v. Hardy*, 353 N.C. 122, 540 S.E.2d 334 (2000), our North Carolina Supreme Court explained that the defendant

> had ample opportunity to object to the instruction outside the presence of the jury. After excusing the jury to the deliberation room, the trial court asked, "Prior to sending back the verdict sheets does the State wish to point out any errors or omissions from the charge?" The trial court then asked the same of defendant, and defendant responded with respect to other issues but did not object to the instruction in question. . . . As defendant failed to preserve this issue by objecting during trial, we will review the record to determine if the instruction constituted plain error.

Id. at 131, 540 S.E.2d at 342 (citing *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 75 (1990); *State v. Morgan*, 315 N.C. 626, 644, 340 S.E.2d 84, 95 (1986)).

¶ 12 The transcript indicates the following: (1) Defendant replied "Yes, sir[,]" when the trial court asked if he was satisfied with using the pattern jury instruction for armed robbery; (2) Defendant replied "No, sir[,]" when the trial court asked if he had "[a]ny additions, corrections, or deletions to the instructions"; and (3) Defendant declined to be heard when the trial court determined it would not include the victims' names when providing the pattern jury instruction.

¶ 13 As in *Harding* and *Hardy*, Defendant had the opportunity to object to the jury instruction, but he failed to do so. On appeal, Defendant "specifically and distinctly" contends the jury instruction amounted to plain error. N.C. R. App. P. 10(a)(4). Thus, we review the record to determine if the instruction constituted plain error. The plain error rule

> is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the

> accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted).

B. Analysis

¶ 14 Defendant argues that the trial court plainly erred by failing to designate in the jury instruction the two individuals named in the indictment as the alleged victims of the armed robbery, thereby allowing the jury to convict Defendant of an offense unsupported by the indictment. Defendant specifically argues that by failing to designate Elijah and Shalik in the jury instruction, "the jury was free to convict based on the uncharged robbery of Tevin[] and Desean[], or potentially even the attempted robbery of Yvette[]."

¶ 15 Where an indictment for robbery with a dangerous weapon alleges two victims in the conjunctive, the defendant's guilt of the offense would be established with proof beyond a reasonable doubt that he robbed either victim – "the State [is] not required to prove both individuals had been robbed by defendant." *State v. Ingram*, 160 N.C. App. 224, 226, 585 S.E.2d 253, 255 (2003) (citing *State v. Montgomery*, 331 N.C. 559, 569, 417 S.E.2d 742, 747 (1992) (stating "the use of a conjunctive in [a robbery with a dangerous weapon] indictment does not require the State to prove various alternative matters alleged") (alteration in original)).

¶ 16 Here, the trial court instructed the jury on the crime of robbery with a firearm, consistent with North Carolina Pattern Jury Instruction 217.20, as follows:

> The defendant has been charged with robbery with a firearm, which is taking and carrying away the personal property of another from his or her person or in his or her presence without his or her consent by endangering or threatening a person's life with firearm, the taker knowing that he was not entitled to take the property, and intending to deprive another of its use permanently. For you to find the defendant guilty of this offense, the State must prove seven

things beyond a reasonable doubt: First, that the defendant took property from the person of another or in the person's presence.

Second, that the defendant carried away the property.

Third, that the person did not voluntarily consent to the taking and carrying away of the property.

Fourth, that the defendant knew that the defendant was not entitled to take the property.

Fifth, that at the time of taking, the defendant intended to deprive that person of its use permanently.

Sixth, that the defendant had a firearm in defendant's possession at the time defendant obtained the property.

Seventh, that defendant obtained the property by endangering or threatening the life of another person with the firearm.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant had, in defendant's possession, a firearm and took and carried away property from the person or presence of a person without that person's voluntary consent by endangering or threatening another person's life with the use or threatened use of a firearm, the defendant knowing that the defendant was not entitled to take the property and intending to deprive that person of its use permanently, it would be your duty to return a verdict of guilty. If you do not so find or if you have a reasonable doubt as to one or more of any of these things, it would be your duty to return a verdict of not guilty.

¶ 17 Both Elijah and Shalik testified at trial. Shalik testified that Defendant and Tevin "placed a gun in [his and Elijah's] chests" while they searched both boys' pockets and wrists. Shalik identified Defendant in court and stated that Defendant had a "black, pump shotgun with red and gold bullets in it" and that he could see the bullets because Defendant cocked the gun and spilled some of the shells onto the ground. As Defendant pointed the gun at the boys and demanded they move to the middle of an

alley, he told the boys to strip down to their underwear and he continued to search them.

¶ 18 Elijah's testimony echoed Shalik's. Elijah identified Defendant in court and stated that Defendant came up to him and pointed a black shotgun, containing red and gold bullets, at his head and chest. Elijah testified that Defendant loaded the red and gold shells into the shotgun, before he pointed it at both boys and threatened to kill them. Defendant then made Elijah and Shalik take off their clothes, before taking approximately $40 from Elijah's pockets. Defendant told Tevin "what to do" and made Tevin "start getting the change and stuff out of [Elijah's and Shalik's] pockets." The State introduced into evidence the shotgun; six unspent shotgun shells; police interviews with Elijah and Shalik, wherein both boys identified the shotgun and shells used during the robbery; and the money taken during the robbery. This evidence was sufficient to support the jury instruction given.

¶ 19 Defendant argues that as a result of the robbery with a firearm instruction given, "the jury was free to convict based on the uncharged robbery of Tevin[] and Desean[]." However, robbery with a firearm has additional elements to those of robbery, and the trial court neither instructed the jury on robbery nor included "guilty of robbery" as a potential verdict on the verdict sheet.

¶ 20 Moreover, the evidence as to Tevin and Desean did not support a verdict of guilty to robbery with a firearm. As the trial court instructed, robbery with a firearm requires "that the defendant had a firearm in defendant's possession at the time defendant obtained the property[,]" and "that defendant obtained the property by endangering or threatening the life of another person with the firearm." The evidence presented at trial did not show that Defendant had Desean's shotgun in Defendant's possession at the time Defendant obtained the shotgun. Moreover, Defendant claimed that he had lost his pistol somewhere inside the truck, and the evidence did not, and could not, show that Defendant had the pistol in his possession at the time Defendant obtained Desean's shotgun or that Defendant threatened the life Tevin and/or Desean with the pistol.

¶ 21 Defendant similarly argues that as a result of the robbery with a firearm instruction given, "the jury was free to convict based on . . . potentially even the attempted robbery of Yvette[]." However, robbery with a firearm has additional elements to those of attempted robbery, and the trial court neither instructed the jury on attempted robbery nor included "guilty of attempted robbery" as a potential verdict on the verdict sheet.

¶ 22 Moreover, the evidence as to Yvette did not support a verdict of guilty to robbery with a firearm. As the trial court instructed, robbery with a firearm requires "that the defendant took property from the person of another or in the person's presence" and "that the defendant carried away the property." The evidence showed that Yvette did not have anything on her and that Defendant did not take anything from her.

¶ 23 The trial court's instruction on robbery with a firearm properly constrained the jury's consideration to the robbery with a dangerous weapon charged in the indictment, comported with the evidence presented at trial, and comported with the verdict sheet presented to the jury. We presume the jury followed the instructions. *State v. Nicholson*, 355 N.C. 1, 60, 558 S.E.2d 109, 148 (2002). Although it is better practice to designate in the robbery with a firearm jury instruction the individual(s) named in the indictment as the alleged victim(s), the trial court did not err in the robbery with a firearm instruction. We need not reach Defendant's argument that Defendant was prejudiced by the trial court's instructional error.

III. Conclusion

¶ 24 The trial court did not err, much less plainly err, in its robbery with a firearm jury instruction by not designating the victims named in the indictment as the alleged victims of the armed robbery.

NO ERROR.

Chief Judge STROUD and Judge WOOD concur.

STATE OF NORTH CAROLINA
v.
CORDERO DEON NEWBORN, DEFENDANT

No. COA20-411

Filed 17 August 2021

1. Indictment and Information—single indictment—possession of firearm by felon—two other charges—fatally defective

Where the indictment charging defendant with possession of a firearm by a felon also included two other offenses, the indictment was fatally defective because it violated N.C.G.S. § 14-415.1(c), which requires a separate indictment for possession of a firearm by a felon.

2. Search and Seizure—motion to suppress—plain view doctrine—accessibility of firearm—material conflict in evidence

The trial court made insufficient findings to support a probable cause determination when it denied defendant's motion to suppress a firearm that was seized during a traffic stop where the court failed to resolve conflicting evidence about whether the firearm was readily accessible to defendant. Under the plain view doctrine—applicable here because the officer initially had probable cause to search defendant's car only for marijuana, but then inadvertently discovered the existence of a firearm in the center console by feeling and seeing the gun's handgrip—the officer could seize the firearm, which required removing the center console panel and therefore constituted a separate search, only if it was readily apparent that the firearm was evidence of a crime (carrying a concealed weapon). The matter was remanded for further findings of fact.

Appeal by Defendant from judgment entered 25 October 2019 by Judge Thomas H. Lock in Haywood County Superior Court. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H. Stein, by Associate Attorney General Jarrett McGowan, for the State.

Joseph P. Lattimore for defendant-appellant.

MURPHY, Judge.

¶ 1 When the charge of possession of a firearm by a felon is brought in an indictment containing other related offenses, the indictment for that charge is rendered fatally defective and invalid, thereby depriving a trial court of jurisdiction over it. *See State v. Wilkins*, 225 N.C. App. 492, 497, 737 S.E.2d 791, 794 (2013). When a trial court makes a conclusion of law while denying a motion to suppress, it must do so with the support of adequate findings of fact that resolve any material conflicts presented by the evidence.

¶ 2 Defendant was charged with possession of a firearm by a felon and two related offenses in a single indictment. The State's failure to obtain a separate indictment for the charge rendered it fatally defective and invalid, and did not invoke the trial court's jurisdiction. According to binding caselaw, we vacate Defendant's conviction for possession of a firearm by a felon.

¶ 3 Additionally, the trial court's ruling on Defendant's *Motion to Suppress* was based on improper findings of fact regarding a material conflict in the evidence of the firearm's accessibility. Given the absence of appropriate findings of fact pertaining to this material conflict, the trial court improperly concluded that the firearm was readily accessible so as to objectively create probable cause that it was evidence of a crime. We therefore remand this matter with instructions for the trial court to make adequate findings of fact resolving the material conflict regarding the firearm's accessibility presented by Defendant's *Motion to Suppress*.

¶ 4 Finally, because the trial court's findings on remand will directly impact the validity of Defendant's non-vacated convictions, Defendant's third issue on appeal regarding the trial court's omission of an actual knowledge requirement from its jury instruction on possession of a firearm with an altered/removed serial number, and related ineffective assistance of counsel claim, are not yet ripe for our consideration and are therefore dismissed without prejudice.

BACKGROUND

¶ 5 At approximately 11:30 p.m. on 25 April 2018 in Maggie Valley, an on-duty patrol officer, Sergeant Ryan Flowers, ran the registration plate of a vehicle driving on U.S. Highway 19 through his patrol vehicle's mobile data terminal ("MDT"). The MDT indicated that Defendant Cordero Deon Newborn was the registered owner of the vehicle and had a permanently revoked driver's license. Based on this information, Sgt. Flowers pursued the vehicle and checked the MDT for pending criminal cases, which reflected Defendant had four counts of misdemeanor

driving while license revoked-not impaired revocation cases pending. After catching up with the vehicle, Sgt. Flowers initiated a traffic stop.

¶ 6 Sgt. Flowers verified Defendant was the driver of the vehicle. Immediately upon interacting with Defendant and his passenger, Samuel Nathanial Angram, III, Sgt. Flowers identified the smell of marijuana emanating from the vehicle. When he inquired about the odor, Angram reportedly stated "[t]here's none in here, man. I just smoked a little in the car a while ago." Citing "probable cause . . . [to] believe [] marijuana was located in the vehicle" based on the odor and Angram's admission, Sgt. Flowers decided to conduct a search of the vehicle, and called for backup.

¶ 7 Sergeant Jeff Mackey arrived on the scene. Angram indicated to Sgt. Mackey that there was a firearm underneath the passenger seat, which Sgt. Mackey located. While searching the driver's side of the vehicle–where the smell of marijuana was reportedly most pungent–Sgt. Flowers felt and visually identified the handgrip of a pistol between the vehicle's center console panel and carpeting, and placed Defendant under arrest for carrying a concealed weapon in violation of N.C.G.S. § 14-269(a). Sgt. Flowers then removed the vehicle's plastic center console panel from the center and retrieved the firearm–a loaded, .45-caliber semiautomatic handgun that was missing a serial number on its frame and barrel.[1]

¶ 8 On 6 August 2018, Defendant was indicted for possession of a firearm by a felon in violation of N.C.G.S. § 14-415.1; possession of a firearm with an altered/removed serial number in violation of N.C.G.S. § 14-160.2(b); and carrying a concealed weapon in violation of N.C.G.S. § 14-269(a). In a separate indictment, Defendant was charged with attaining habitual felon status as defined by N.C.G.S. § 14-7.1.

¶ 9 On 11 March 2019, Defendant filed a pretrial *Motion to Suppress* any evidence seized during the traffic stop. The motion was heard and denied on 22 October 2019, after the trial court found that Sgt. Flowers described the firearm as "readily accessible." However, the trial court made no findings as to the firearm's readily accessible location. At trial, Defendant did not raise a renewed objection when materials pertaining to the firearm seized from the center console area were introduced and admitted into evidence.

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1. While Sgt. Flowers testified that he could not "recall whether [it was] on the roadside or after [he] transported [Defendant] to the detention facility[,]" his testimony established that at some point after he retrieved the firearm from the vehicle's center console area, he discovered that Defendant was a convicted felon.

¶ 10 The jury found Defendant guilty of possession of a firearm by a felon, possession of a firearm with an altered/removed serial number, and carrying a concealed weapon. As a result of the guilty verdicts, Defendant pled guilty to attaining habitual felon status.[2] On 25 October 2019, the trial court entered judgment, and Defendant provided oral notice of appeal.

¶ 11 Defendant raises three issues on appeal: (A) the trial court lacked jurisdiction over the charge of possession of a firearm by a felon because it was not contained in a separate indictment as required by the governing statute; (B) the trial court plainly erred in denying Defendant's pretrial *Motion to Suppress*; and (C) the trial court plainly erred by failing to instruct the jury on the requirement of actual knowledge as an element of the offense of possession of a firearm with an altered/removed serial number.

ANALYSIS

A. Indictment for Possession of a Firearm by a Felon

¶ 12 **[1]** "We review the sufficiency of an indictment *de novo*." *Wilkins*, 225 N.C. App. at 495, 737 S.E.2d at 793. While Defendant failed to challenge his indictment for the charge of possession of a firearm by a felon at the trial court, "where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498, *reh'g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2000).

¶ 13 N.C.G.S. § 14-415.1(c) dictates "[t]he indictment charging [a] defendant [with possession of a firearm by a felon] shall be separate from any indictment charging him with other offenses related to or giving rise to [that] charge[.]" N.C.G.S. § 14-415.1(c) (2019).

¶ 14 Defendant's charge of possession of a firearm by a felon was contained in a single indictment with two other charges: possession of a firearm with an altered/removed serial number and carrying a concealed weapon. Defendant quotes N.C.G.S. § 14-415.1(c) and asserts these

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2. Defendant also pled guilty to a Class 3 misdemeanor of driving while license revoked-not an impaired revocation, but does not make any argument pertaining to that offense on appeal. His appeal of that conviction is therefore deemed abandoned. *See State v. Harris*, 21 N.C. App. 550, 551, 204 S.E.2d 914, 915 (1974) (stating that issues "not set out in [an] appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned"); N.C. R. App. P. 28(b)(6) (2021).

charges are "relate[d] to or giv[e] rise to" the possession of a firearm by a felon charge, given that all three charges pertain to the same weapon and arose from the same search. In support of his contention, Defendant cites *Wilkins*, where we held the language of N.C.G.S. § 14-415.1(c) "mandates that a charge of [p]ossession of a [f]irearm by a [f]elon be brought in a separate indictment from charges related to it[.]" *Wilkins*, 225 N.C. App. at 497, 737 S.E.2d at 794.

¶ 15 In *Wilkins*, the defendant was indicted for possession of a firearm by a felon and assault with a deadly weapon. *Id.* at 493, 737 S.E.2d at 793. Both charges were listed in the same indictment, referred to the same weapon, and arose from the same incident–the defendant's use of a firearm during a robbery. *Id.* at 496, 737 S.E.2d at 794. Giving "effect to the intent of the legislature as expressed in the statute's plain language[,]" we concluded the State's failure to obtain a separate indictment for that charge rendered it "fatally defective, and thus invalid." *Id.* at 497, 737 S.E.2d at 794. As a result, we held the trial court lacked jurisdiction over the charge of possession of a firearm by a felon, and vacated the defendant's conviction for the offense. *Id.*

¶ 16 In response to Defendant's arguments regarding the separate indictment requirement, the State urges that *Wilkins*, and any cases consistent with it, must be read in light of *State v. Brice*, where our Supreme Court addressed a special indictment provision contained in N.C.G.S. § 15A-928(b). *State v. Brice*, 370 N.C. 244, 249, 806 S.E.2d 32, 36 (2017). N.C.G.S. § 15A-928(b) requires, *inter alia*, that "[a]n indictment or information for the offense must be accompanied by a special indictment . . . ." N.C.G.S. § 15A-928(b) (2019). In *Brice*, our Supreme Court noted that while the special indictment provision was "couched in mandatory terms, that fact, standing alone, does not make them jurisdictional in nature." *Brice*, 370 N.C. at 253, 806 S.E.2d at 38. After "a careful examination of the language . . . , coupled with an analysis of the purposes sought to be served[,]" our Supreme Court ultimately concluded that the special indictment provision in N.C.G.S. § 15A-928(b) was not jurisdictional in nature, and as a result, the defendant could not challenge an indictment's failure to comply with that special indictment provision for the first time on appeal. *Id.* The State argues we should apply this same reasoning to the present case to conclude that the separate indictment provision contained in N.C.G.S. § 14-415.1(c) does not constitute a jurisdictional requirement, and consequently, Defendant's challenge to the indictment has been waived because he raised it for the first time on appeal.

¶ 17 However, we must follow the well-established principle that "[w]here a panel of the Court of Appeals has decided *the same issue* . . .

a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (emphasis added). Our Supreme Court's decision in *Brice* pertained to a special indictment provision in a completely different statute, while our decision in *Wilkins* concerned the same issue posed in the present case by Defendant: the separate indictment provision in N.C.G.S. § 14-415.1(c).

¶ 18 Consistent with our decision in *Wilkins*, we hold the State's failure to obtain a separate indictment for the offense of possession of a firearm by a felon, as mandated by N.C.G.S. § 14-415.1(c), rendered the indictment fatally defective and invalid as to that charge. Accordingly, the trial court lacked jurisdiction over the charge of possession of a firearm by a felon. *See Wilkins*, 225 N.C. App. at 497, 737 S.E.2d at 794. Defendant's conviction for possession of a firearm by a felon in violation of N.C.G.S. § 14-415.1 is vacated.

B. Motion to Suppress

¶ 19 **[2]** Defendant also challenges the trial court's denial of his pretrial *Motion to Suppress*, and subsequent admission of the firearm seized from the center console of his vehicle into evidence at trial, on the grounds that the firearm was retrieved through an unreasonable search and seizure in violation of the United States and North Carolina constitutions. *See Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090 (holding the Fourth Amendment of the United States Constitution applies to the states through the Due Process Clause of the Fourteenth Amendment), *reh'g denied*, 368 U.S. 871, 7 L. Ed. 2d 72 (1961); *State v. Garner*, 331 N.C. 491, 506, 417 S.E.2d 502, 510 (1992) ("Article I, Section 20 of [the North Carolina] Constitution, like the Fourth Amendment to the United States Constitution, prohibits unreasonable searches and seizures[.]"). After addressing whether Defendant properly preserved this matter for appellate review, we examine whether the trial court's *Order Denying Defendant's Motion to Suppress Evidence* made adequate findings of fact pertaining to the material conflict of the accessibility of the firearm seized from the center console area.

1. Preservation

¶ 20 Defendant filed a pretrial *Motion to Suppress* items seized during the 25 April 2018 search of his vehicle, which the trial court denied. However, Defendant failed to raise a renewed objection at trial when the State introduced the seized firearm, and photographs of it, into evidence. Accordingly, the issue was not properly preserved for appellate review. *See State v. Golphin*, 352 N.C. 364, 463, 533 S.E.2d 168, 232

(2000) (citation omitted) ("A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. His objection must be renewed at trial."), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

¶ 21 However, Defendant "specifically and distinctly" argues on appeal that the trial court's denial of his motion, and subsequent admission of the firearm into evidence, amounted to plain error. *See State v. Waring*, 364 N.C. 443, 508, 701 S.E.2d 615, 655 (2010) (marks omitted) ("In criminal cases, a question which was not preserved by objection nevertheless may be made the basis of an [appeal] where the judicial action questioned is specifically and distinctly contended to amount to plain error."), *cert. denied*, 565 U.S. 832, 181 L. Ed. 2d 53 (2011); *see also* N.C. R. App. P. 10(a)(4) (2021).

2. Plain Error

¶ 22 Our Supreme Court has held:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice–that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (marks and citations omitted). We "apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases." *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018) (reiterating the plain error standard from *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334).

¶ 23 "In conducting our review for plain error, we must first determine whether the trial court did, in fact, err in denying Defendant's motion to suppress." *State v. Powell*, 253 N.C. App. 590, 594, 595, 800 S.E.2d 745, 748-49 (2017) (noting that, in a plain error analysis regarding the denial of a motion to suppress, we apply the normal standard of review to determine whether error occurred).

¶ 24 "The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law."

State v. Jackson, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176, *disc. rev. denied*, 369 N.C. 190, 793 S.E.2d 694 (2016).

a. Findings of Fact

¶ 25 Defendant argues that the trial court made erroneous findings of fact in its *Order Denying Defendant's Motion to Suppress Evidence*, specifically contending that Findings of Fact 23 and 25 were not supported by competent evidence. Finding of Fact 23 states:

> 23. That afterwards, [Sgt.] Flowers re-approached Defendant and asked him if there were any other firearms in the vehicle, to which Defendant replied there were not. [Sgt.] Flowers then began to search the vehicle. He concentrated on the front driver's side floorboard and center console area because that is where the odor of marijuana smelled strongest to him.

The finding immediately preceding Finding of Fact 23 pertained to Sgt. Mackey's discovery of the first firearm underneath the vehicle's passenger seat. Defendant claims Finding of Fact 23 inaccurately states that Sgt. Flowers began searching the center console area of the vehicle immediately after Sgt. Mackey's discovery of the first firearm, when Sgt. Mackey's testimony established both he and Sgt. Flowers conducted individual searches that bore no fruit prior to the search referenced in Finding of Fact 23.

¶ 26 However, the testimony Defendant references, where Sgt. Mackey stated "I searched it once; he searched it once because he started on the driver's side and I started on the passenger side[,]" does not establish a clear timeline for these searches. This testimony could be reasonably construed to indicate these initial searches occurred prior to, or concurrently with, the search of the center console area by Sgt. Flowers referenced in Finding of Fact 23. Further, the language "[t]hat afterwards" merely indicates that Sgt. Flowers' discovery of a firearm on the driver's side of the vehicle occurred after Sgt. Mackey's discovery of a firearm underneath the passenger seat. This general timeline was not disputed and is corroborated by Defendant's own challenge on appeal.

¶ 27 Sgt. Mackey's testimony was "evidence that a reasonable mind might accept as adequate to support the finding" that Sgt. Flowers searched the driver's side of the vehicle and located a firearm in the center con-

sole area after Sgt. Mackey discovered a firearm underneath the passenger seat. *See Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176. Finding of Fact 23 does not constitute an erroneous finding of fact.

¶ 28 Defendant also argues that Finding of Fact 25 was not supported by competent evidence. Finding of Fact 25 states:

> 25. That [Sgt.] Flowers then removed the driver's side, plastic center console panel from the center console. It took some effort, but *no tools were needed*. He located a Kahr model CW45 .45-caliber semi-automatic handgun in a natural void behind the panel.

(Emphasis added). Defendant challenges this finding of fact for "significantly downplay[ing] [the] difficulty [Sgt. Flowers had] in removing the console[,]" and further alleges there was no evidence at the suppression hearing to substantiate the portion of the finding that states "no tools were needed." We agree that this portion of Finding of Fact 25 regarding no need for tools was not supported by competent evidence.

¶ 29 At the hearing on Defendant's *Motion to Suppress*, Sgt. Flowers testified that the center console's plastic covering "[p]retty much" popped right off, but also confirmed he "had to get on [his] hands and knees . . . [to] pull [it] loose[.]" He admitted it "took a little work" to remove the plastic panel, and stated he did not recall whether the center console had screws, or how it came loose. However, no further testimony or evidence relating to tools was given at the suppression hearing. It was only after the hearing, at trial, that Sgt. Flowers testified that he did not require special tools to remove the panel.

¶ 30 "[T]he facts supporting the trial court's decision to grant or deny a defendant's suppression motion will be established *at the suppression hearing* on the basis of testimony given under oath." *State v. Salinas*, 366 N.C. 119, 125-26, 729 S.E.2d 63, 68 (2012) (emphasis added) (marks omitted) (citing N.C.G.S. § 15A-977(d) (2011)). In reviewing the testimony presented at the hearing on Defendant's *Motion to Suppress*, there was no "evidence that a reasonable mind might accept as adequate to support the finding" that "no tools were needed" in Sgt. Flowers' removal of the center console panel. *See Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176. Further, this portion of Finding of Fact 25 contradicts Sgt. Flowers' own testimony at the hearing on Defendant's *Motion to Suppress*, where he stated that he did not recall whether the panel had screws or how it came loose.

¶ 31 Therefore, this challenged portion of Finding of Fact 25–"no tools were needed"–was unsupported by evidence presented at the *Motion to Suppress* hearing, and is not binding on appeal. *See State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012).

b. Conclusions of Law and Denial of the Motion to Suppress

¶ 32 We next determine whether–in the absence or presence of the aforementioned portion of Finding of Fact 25 and the trial court's other related finding of fact[3]–the trial court's remaining findings of fact support its conclusions of law and denial of Defendant's *Motion to Suppress*. In its order denying the motion, the trial court made the following conclusions of law:

> 3. . . . [Sgt.] Flowers had reasonable and articulable suspicion of criminal activity to justify a motor vehicle stop based upon the information which he received from his MDT regarding the registration and driver's license information relating to [Defendant's vehicle]; . . . .

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3. Though not referenced by Defendant in his challenge on appeal, we note that the trial court's Finding of Fact 27, which states "on re-direct examination, [Sgt.] Flowers described the Kahr firearm as 'readily accessible' to someone who knew it was there, as he could feel it and see it without removing the panel[,]" cannot properly be considered as a finding of fact, as it reflects a mere recitation of testimony. *See In re: N.D.A.*, 373 N.C. 71, 75, 833 S.E.2d 768, 772 (2019) (marks omitted) ("We agree with the Court of Appeals that recitations of the testimony of [a] witness *do not* constitute *findings of fact* by the trial judge."); *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983) ("Although . . . recitations of testimony may properly be included in an order denying suppression, they cannot substitute for findings of fact resolving material conflicts.").

Our review must be "limited to those facts found by the trial court and the conclusions reached in reliance on those facts, *not* the testimony recited by the trial court in its order." *State v. Derbyshire*, 228 N.C. App. 670, 679-80, 745 S.E.2d 886, 892-93 (2013) (emphasis added) (holding "mere recitation of testimony . . . is not sufficient to constitute a valid finding of fact"), *disc. rev. denied*, 367 N.C. 289, 753 S.E.2d 785 (2014). Accordingly, in determining whether the trial court made proper findings of fact as to the material conflict of the firearm's accessibility, we limit our review to the trial court's proper findings of fact. We further note that this recitation of Sgt. Flowers' testimony regarding his subjective opinion as to the firearm's accessibility, which the trial court erroneously designated as a finding of fact, cannot provide the objective probable cause necessary to conduct a warrantless search of the vehicle. *See State v. Burwell*, 256 N.C. App. 722, 733, 808 S.E.2d 583, 592 (2017) (citing *Devenpeck v. Alford*, 543 U.S. 146, 160 L. Ed. 2d 537 (2004)) ("[W]arrantless arrests are reasonable under the Fourth Amendment if there is objective probable cause to arrest for the violation of an offense."), *disc. rev. denied*, *appeal dismissed*, 370 N.C. 569, 809 S.E.2d 873 (2018); *see also State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999) ("[F]or situations arising under [the North Carolina] Constitution, we hold that an objective standard, rather than a subjective standard, must be applied to determine the reasonableness of police action related to probable cause.").

> 4. That the positive identification of Defendant as the driver . . . justified further detainment[.]
>
> 5. That immediately after engaging Defendant in Defendant's vehicle, [Sgt.] Flowers developed probable cause to conduct a warrantless search of the [vehicle] due to the "relatively strong" odor of marijuana emanating from the interior of the vehicle, particularly after the passenger's admission that marijuana had just been smoked. . . .
>
> 6. That the discovery of the first firearm under the passenger's seat by [Sgt.] Mackey provided additional probable cause to search the vehicle, as it supported a second violation, to wit: Carrying a Concealed Weapon . . . , and more concealed weapons may have been present.
>
> 7. That [Sgt.] Flowers' decision to search the [vehicle] and the subsequent search thereof – including the scope of that search – was reasonably-based upon the totality of the circumstances, and such circumstances were sufficiently strong in and of themselves to establish probable cause for this search and the resulting arrest of Defendant for the charges of Possession of Firearm by Felon, Possession of a Firearm with Altered/Removed Serial Number, Carrying a Concealed Weapon, and Driving While License Revoked – Not Impaired Revocation.
>
> 8. That the stop, investigation, detention, and arrest of Defendant did not constitute a violation of the federal or state constitutions, and it was in compliance with the North Carolina Criminal Procedure Act contained in Chapter 15A of the North Carolina General Statutes.

Defendant argues the trial "court's conclusion that there was probable cause . . . was in conflict with the testimony of Sgt. Flowers."

¶ 33 Both the United States Constitution and our state constitution protect individuals from unreasonable searches and seizures, and evidence seized in violation of these constitutional protections must be suppressed. U.S. Const. amend. IV; N.C. Const. art. I, § 20; *see Garner*, 331 N.C. at 505-06, 417 S.E.2d at 510; *Mapp*, 367 U.S. at 655, 6 L. Ed. 2d at 1090.

¶ 34 We note that Sgt. Flowers' action of removing the center console constituted a separate search from the search for marijuana that was the lawful objective of his entry into the driver's side of the vehicle. *See Arizona v. Hicks*, 480 U.S. 321, 324-25, 94 L. Ed. 2d 347, 353-54 (1987) (holding an officer's "moving of [stereo] equipment . . . constitute[d] a [search] separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of [the police officer's] entry into the apartment.").

¶ 35 Merely inspecting the portion of the firearm that came into Sgt. Flowers' view during the search for marijuana was not an independent search, as it did not produce an additional invasion of Defendant's privacy interest. *See id.* at 325, 94 L. Ed. 2d at 354. However, "taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of [the vehicle's] contents, did produce a new invasion of [Defendant's] privacy unjustified by the exigent circumstance that validated the entry." *Id.* The "distinction between looking at a suspicious object in plain view and moving it even a few inches is much more than trivial for purposes of the Fourth Amendment." *Id.* (marks omitted).

¶ 36 Therefore, it must be determined whether this independent search of the console area was reasonable. The lack of a relationship between Sgt. Flowers' search of the center console area and the initial entry to the vehicle does not render the search *ipso facto* unreasonable, as:

> That lack of relationship *always* exists with regard to action validated under the plain view doctrine[.] . . . It would be absurd to say that an object could lawfully be seized and taken from the premises, but could not be moved for closer examination. It is clear, therefore, that the search here was valid if the plain view doctrine would have sustained a seizure of the [firearm]. . . . [I]n order to invoke the plain view doctrine[,] . . . probable cause [to believe the item was evidence of a crime] is required.

Id. at 325-26, 94 L. Ed. 2d at 354-55 (marks omitted).

¶ 37 "Objects which are in the plain view of a law enforcement officer who has the right to be in the position to have that view are subject to seizure and may be introduced into evidence." *State v. Hunter*, 299 N.C. 29, 34, 261 S.E.2d 189, 193 (1980). Under the plain view doctrine:

> [P]olice may seize contraband or evidence if (1) the officer was in a place where he had a right to be when the evidence was discovered; (2) the evidence was discovered inadvertently; and (3) *it was immediately apparent to the police that the items observed were evidence of a crime* or contraband.

State v. Graves, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999) (emphasis added).

¶ 38 Defendant does not challenge whether the officers had the authority to enter his vehicle to search for marijuana. Thus, the first prong of the plain view doctrine is not at issue. Additionally, there was testimony at the *Motion to Suppress* hearing supporting that Sgt. Flowers' initial discovery of the firearm occurred inadvertently–while searching for marijuana and reaching in and around the vehicle's center console area–and Defendant does not challenge whether the discovery occurred inadvertently, so the second prong of the plain view doctrine is also not at issue.

¶ 39 However, Defendant contends that the seizure does not comply with the third prong of the plain view doctrine and argues that it was not "immediately apparent" to Sgt. Flowers that the handgrip of the firearm constituted evidence of the crime of carrying a concealed weapon because it was not within easy reach and readily accessible to Defendant.

¶ 40 "An item is immediately apparent under the plain view doctrine if the police have probable cause to believe that what they have come upon is evidence of criminal conduct." *State v. Haymond*, 203 N.C. App. 151, 162, 691 S.E.2d 108, 119 (marks omitted), *disc. rev. denied*, 364 N.C. 600, 704 S.E.2d 275 (2010). "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt." *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984) (marks omitted). "Probable cause exists where the facts and circumstances within [an] officer's knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed." *Id.* (marks omitted).

¶ 41 "The essential elements of carrying a concealed weapon in violation of N.C.G.S. § 14-269(a) are: (1) [t]he accused must be off his own premises; (2) he must carry a deadly weapon; and (3) the weapon must be concealed about his person." *State v. Hill*, 227 N.C. App. 371, 380, 741 S.E.2d 911, 918 (marks omitted), *disc. rev. denied*, *appeal dismissed*, 367 N.C. 223, 747 S.E.2d 577 (2013). The weapon does not necessarily need to be

concealed "on the person of the accused, but in such a position as gives him *ready access to it*[.]" *Id.* at 381, 741 S.E.2d at 918 (emphasis added). The weapon must be "concealed near, in close proximity to him, and within his convenient control and easy reach, so that he could promptly use it, if prompted to do so by any violent motive." *State v. Gainey*, 273 N.C. 620, 623, 160 S.E.2d 685, 687 (1968).

¶ 42 In his testimony at the *Motion to Suppress* hearing, Sgt. Flowers stated the firearm was "pretty hard to get to[,]" and confirmed he had to get on his hands and knees to remove the plastic covering of the center console. However, Sgt. Flowers also testified that he believed "if you knew [the firearm] was there, you could get it out just by prying the panels [loose] without breaking it all the way off." He testified that he "could agree" with defense counsel that the firearm would not be readily accessible if the panel was not removed, but also said "[i]t could have been readily available. I did not have knowledge of how to pry that piece of material off. . . . I can't confirm whether it's easy or not easy to get to. I don't own the vehicle."

¶ 43 Based on this conflicting testimony, it is unclear what degree of difficulty Sgt. Flowers experienced in attempting to remove the center console panel. The contradictory evidence regarding this degree of difficulty is a material conflict requiring findings of fact, as establishing how difficult it was to remove the center console panel is a prerequisite to determining whether or not the firearm was "readily accessible" to create probable cause that the firearm constituted evidence of the crime of carrying a concealed weapon in violation of N.C.G.S. § 14-269(a).

¶ 44 The trial court's *Order Denying Defendant's Motion to Suppress Evidence* did not contain any findings of fact related to the degree of difficulty Sgt. Flowers had in removing the center console panel and retrieving the firearm. As a result, the trial court failed to make necessary findings to resolve a material conflict presented by the evidence during the *Motion to Suppress* hearing: whether the firearm was within Defendant's "convenient control and easy reach, so that he could promptly use it," such that there was probable cause to believe it constituted evidence of the crime of illegally carrying a concealed weapon. *See id.*

¶ 45 Without resolving this material conflict through adequate findings of fact, the trial court's conclusions regarding probable cause are not supported. Further, without adequate findings of fact regarding the firearm's accessibility, the trial court could not properly rule on Defendant's *Motion to Suppress*.

3. Necessary Findings on Remand

¶ 46 The trial court's failure to make necessary findings of fact prevents us from conducting meaningful appellate review of the material conflict presented by the evidence, and this error was capable of sufficiently prejudicing Defendant. *See State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984) ("Findings and conclusions are required in order that there may be a meaningful appellate review of the decision."). We must remand for the trial court to make adequate findings of fact resolving whether or not the firearm was "readily accessible" to Defendant such that it objectively created probable cause to believe it constituted evidence of illegally carrying a concealed weapon. In making this determination, the trial court's findings of fact must be limited to evidence adduced at the hearing on Defendant's *Motion to Suppress* and may not substitute later testimony or mere recitations of testimony at the *Motion to Suppress* hearing for findings of fact on the motion. *See Lang*, 309 N.C. at 520, 308 S.E.2d at 321 ("Although . . . recitations of testimony may properly be included in an order denying suppression, they cannot substitute for findings of fact resolving material conflicts.").

¶ 47 We therefore remand for further findings of fact consistent with this opinion.

C. Instruction Regarding Actual Knowledge of Serial Number Removal

¶ 48 On remand, the determination of the firearm's accessibility will directly impact not only the validity of the trial court's order denying Defendant's suppression motion and Defendant's conviction for the non-vacated offense of carrying a concealed weapon, but also Defendant's conviction for possession of a firearm with an altered/removed serial number. Consequently, Defendant's third challenge raised on appeal pertaining to the trial court's jury instruction as to the charge of possession of a firearm with an altered/removed serial number, as well as his claim of ineffective assistance of counsel, are dismissed without prejudice as they are not yet ripe.

CONCLUSION

¶ 49 The trial court lacked jurisdiction over the charge of possession of a firearm by a felon due to the State's failure to obtain a separate indictment for that charge in compliance with N.C.G.S. § 14-415.1. Further, the trial court failed to make necessary findings of fact regarding the seized firearm's accessibility, this error was potentially sufficiently prejudicial to Defendant, and further findings of fact are needed to resolve the ma-

terial conflict of the firearm's accessibility. In light of the impact these findings of fact may have on Defendant's remaining non-vacated convictions, Defendant's challenge to the trial court's jury instruction as to the charge of possession of a firearm with an altered/removed serial number, as well as his claim of ineffective assistance of counsel, are not yet ripe for our consideration.

VACATED IN PART; REMANDED FOR FURTHER FINDINGS IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges DIETZ and CARPENTER concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
ROBERT LOUIS STATON, DEFENDANT

No. COA20-676

Filed 17 August 2021

Firearms and Other Weapons—discharging into an occupied vehicle while in operation—"into property" element—toolbox in truck bed

There was sufficient evidence to convict defendant of discharging a firearm into an occupied vehicle while in operation, in violation of N.C.G.S. § 14-34.1(b), where the "into property" element was satisfied by a bullet fired from defendant's gun striking the toolbox that was attached inside the bed of the victim's truck, adjacent to the wall of the truck's passenger cabin.

Appeal by Defendant from judgment entered 30 January 2020 by Judge Wayland Sermons in Martin County Superior Court. Heard in the Court of Appeals 25 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.

Mark Hayes for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Robert Louis Staton ("Defendant") appeals from a conviction of discharging a firearm into an occupied vehicle while in operation. Defendant argues that the court erred by not dismissing the charge because the bullet hit the toolbox and not the truck. After review, we discern no error.

I. Factual and Procedural Background

¶ 2 On 3 December 2018, Defendant was indicted for (1) discharging a firearm into an occupied vehicle while in operation and (2) possession of a firearm by a felon. This charge arose from an incident where Defendant fired three shots at the pickup truck of Mr. John Griffin while both individuals were driving down the road.

¶ 3 At trial, Mr. Griffin testified that Defendant pulled onto the road behind him and accelerated until Defendant positioned his vehicle closely behind Mr. Griffin's vehicle. Mr. Griffin stated that he saw Defendant stick his arm out the window of Defendant's vehicle with a small caliber gun and fire three shots at Mr. Griffin's pickup. Mr. Griffin immediately went to the police station and found no one present. He then went to the magistrate's office. When Mr. Griffin arrived at the magistrate's office, he saw one bullet hole in his toolbox. He testified that the hole came from the Defendant's shots at his vehicle. The State offered into evidence photographs of Mr. Griffin's truck, photographs of Mr. Griffin's toolbox with a single hole from a gunshot, and a photograph of the bullet that was pulled from Mr. Griffin's toolbox. Mr. Griffin testified that he was unaware of any damage to his toolbox prior to the interaction with Defendant.

¶ 4 Defendant made an initial motion to dismiss for insufficiency of the evidence at the close of the State's evidence. That motion was denied. Defendant's motion to dismiss for insufficiency of the evidence was renewed after all evidence had been entered and was again denied by the trial court judge.

¶ 5 On 30 January 2020, a jury found Defendant guilty of (1) discharging a firearm into an occupied vehicle while in operation and (2) possession of a firearm by a felon. Defendant timely appeals.

II. Analysis

¶ 6 Defendant appeals from a jury verdict finding Defendant guilty of discharging a firearm into an occupied vehicle while in operation, in violation of N.C. Gen. Stat. § 14-34.1(b). Defendant contends that the trial court erred by not granting Defendant's motion to dismiss for lack of evidence. Defendant argues that under N.C. Gen. Stat. § 14-34.1(b),

the bullet must, at a minimum, strike an exterior wall of the vehicle to be a violation of the statute. Defendant also argues that N.C. Gen. Stat. § 14-34.1(b) was not violated because the toolbox is not included as part of the truck for the purposes of the statute. We disagree.

¶ 7 Defendant properly preserved the denial of the motion to dismiss for insufficiency of the evidence for appeal at the trial court level. *See* N.C. R. App. P. 10(a)(3) (stating a party who wishes to preserve for appeal a motion to dismiss for insufficiency of the evidence must make a motion to dismiss at the close of the State's evidence and again at the close of all evidence).

A. Standard of Review

¶ 8 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of the offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. The Motion to Dismiss

¶ 9 The trial court did not err in denying Defendant's motion to dismiss. The evidence, when viewed in the light most favorable to the State, substantially showed that each element of N.C. Gen. Stat. § 14-34.1(b) had been met and that Defendant was the perpetrator.

¶ 10 N.C. Gen. Stat. § 14-34.1(b) requires a defendant to "(1) willfully and wantonly discharg[e] (2) a firearm (3) into property (4) while it is occupied." *State v. Rambert*, 341 N.C. 173, 175, 459 S.E.2d 510, 512 (1995). The "into property" element includes any "building, structure, vehicle, aircraft, or other conveyance, device, equipment, erection, or enclosure[.]" N.C. Gen. Stat. § 14-34.1(a) (2019).

¶ 11 Defendant does not contest the sufficiency of the State's evidence as to the elements of willfully and wantonly discharging a firearm or that

the vehicle was occupied. Defendant only argues that the State failed to prove that any shot went "into" the vehicle.

¶ 12 "[T]he 'into [property]' element is satisfied when [a] bullet[] damage[s] the exterior of a building, even though there is no evidence that the bullet[] penetrated to the interior." *State v. Canady*, 191 N.C. App. 680, 689, 664 S.E.2d 380, 385 (2008) (citations omitted). Further, "[t]here is no requirement that the defendant have a specific intent to fire *into* the occupied building, only that he . . . (1) intentionally discharged the firearm *at* the occupied building with the bullet(s) entering the occupied building, or (2) intentionally discharged the firearm at a person with the bullet(s) entering an occupied building." *Id.* at 686, 664 S.E.2d at 383-84 (citation omitted).

¶ 13 In *State v. Miles*, 223 N.C. App. 160, 733 S.E.2d 572 (2012), the defendant alleged that he had not violated N.C. Gen. Stat. § 14-34.1(b) when he discharged a firearm that struck a porch because the porch was not part of the house. *State v. Miles*, 223 N.C. App. 160, 161, 733 S.E.2d 572, 573 (2012). This Court found no error by the trial court in denying the defendant's motion to dismiss pursuant to N.C. Gen. Stat. § 14-34.1(b). *Id.* at 160, 733 S.E.2d at 573. This Court reasoned that the porch fell into the meaning of "building" because it was attached to the house and shared many of the same activities as the home. The *Miles* Court employed a broad construction of N.C. Gen. Stat. § 14-34.1, applying the statute to "any building, structure . . . or other conveyance, device, equipment, erection, or enclosure", and there was no reason to find that the porch was not part of the house, given the purpose of the statute. *Id.* at 163-64, 733 S.E.2d at 574-75. "The purpose of [N.C. Gen. Stat.] § 14-34.1 is to protect occupants of the building, vehicle, or other property, described in the statute." *Id.* at 163, 733 S.E.2d at 575 (quoting *State v. Mancuso*, 321 N.C. 464, 468, 364 S.E.2d 359, 362 (1988)).

¶ 14 Here, the "into [property]" element was satisfied when the bullet struck the truck's toolbox. While the bullet did not enter the vehicle through a standard part of the vehicle, such as the tailgate or the door, the bullet did strike the exterior of the vehicle, via the toolbox. Similar to *Miles*, where this Court ruled that a bullet that struck the outside of a porch satisfied the "into [property]" element, a bullet striking a toolbox connected to an occupied vehicle is sufficient to satisfy the "into [property]" element. In *Miles*, the porch was attached to the exterior of the house and shared a common wall with the house. *Miles*, 223 N.C. App. at 163, 733 S.E.2d at 574. In the case before us, the toolbox was similarly fastened to the exterior of the truck and even sat inside the bed of the truck, adjacent to the wall of the truck's passenger cabin.

¶ 15 The legislative purpose of the statute is clear. The purpose of the statute is to protect the occupants of certain properties from being shot at. *Mancuso*, 321 N.C. at 468, 364 S.E.2d at 362. To hold that Defendant is not guilty would contradict the purpose of the statute and frustrate the intent of the legislature.

¶ 16 We agree with the trial court that the State met its burden to proceed to the jury on its theory that Defendant willfully discharged a firearm into an occupied vehicle while in operation. The bullet striking the toolbox of the vehicle is sufficient to meet the requirement of firing "into [property]".

III. Conclusion

¶ 17 The trial court did not err in denying Defendant's motion to dismiss the charge of discharging a firearm into an occupied vehicle while in operation.

NO ERROR.

Chief Judge STROUD and Judge HAMPSON concur.

MICHELLE PORTMAN WALTER, Plaintiff-Appellee
v.
JAMES MILTON WALTER, JR., Defendant-Appellant

No. COA20-590

Filed 17 August 2021

1. Contempt—willful violation of order—ambiguous terms—reasonable interpretation

The trial court erred by finding a father in civil contempt for willful violation of a child custody and support consent order where the consent order was ambiguous as to the relevant issue (summer vacation), such that the father's interpretation of the ambiguous provisions was reasonable.

2. Attorney Fees—civil contempt order—vacated—no legal basis for attorney fees

Where the trial court's order holding a father in civil contempt for willful violation of a child custody and support consent order was vacated because the consent order was ambiguous as to the

relevant issue (summer vacation), the portion of the order awarding attorney fees to the mother was also vacated because there was no legal basis for an award of attorney fees. This case did not present one of the limited situations in which attorney fees could still be awarded even though the alleged contemnor could not be held in contempt at the time of the hearing.

Appeal by defendant from order entered 20 February 2020 by Judge Laurie Hutchins in District Court, Forsyth County. Heard in the Court of Appeals 27 April 2021.

Morrow, Porter, Vermitsky & Taylor, PLLC, by John C. Vermitsky, for Plaintiff-Appellee.

Fox Rothschild LLP, by Michelle D. Connell, for Defendant-Appellant.

STROUD, Chief Judge.

¶ 1 James Milton Walter, Jr., ("Father") appeals from a contempt order entered 20 February 2020 in which the trial court determined that Father had willfully violated a child-custody order and held Father in civil contempt. For the reasons discussed herein, we vacate.

I. Background

¶ 2 Michelle Portman Walter ("Mother") and Father were married in 2000 and divorced in February 2016. The couple are the parents to two minor children during their marriage, "KLW" and "ELW."[1]

¶ 3 On 22 October 2015, Mother filed a complaint asserting claims for child custody, child support, post-separation support, alimony, attorney's fees, equitable distribution, and absolute divorce. Father filed an answer and asserted counterclaims for child custody, child support, and equitable distribution on 28 December 2015. Mother replied and filed a motion for summary judgment divorce. Absolute divorce was granted on 1 February 2016.

¶ 4 On 11 March 2016, the district court entered a Consent Order for Child Custody and Child Support (the "Consent Order"). The Consent Order awarded joint legal custody to the parties, with primary legal custody to Father and secondary legal custody to Mother. The Consent

1. Pseudonyms are used throughout the opinion to protect the identity of the juveniles and for ease of reading.

Order does not expressly award "physical custody" to either party and defines "joint legal custody" as follows:[2]

> [J]oint legal custody shall mean that the parties shall discuss and mutually decide upon all major educational, religious, and medical decisions affecting or involving their minor children. Further, the minor children of the parties shall reside with [Father] and spend time with [Mother] as the parties mutually agree. In the event the parties cannot agree, the schedule shall be as follows
>
> > a. The minor children shall reside with [Father], but spend time with [Mother] based on a two week schedule.
> >
> > b. Beginning on January__, 2016 [Mother] shall have the minor children on Tuesday or Thursday evenings for dinner from 5:30 p.m. until 7:30 p.m. [Mother] shall also have the minor children from Friday at 5:30 p.m. until Sunday at 5:30 p.m. The following week, [Mother] shall have the minor children for dinner on Thursday for dinner from 5:30 p.m. until 7:30 p.m. This two week schedule shall continue to repeat itself. The intent of this schedule is that [Mother] not have a seven day period without seeing the children, *absent vacations*. Thus if [Father] has the children for a weekend, [Mother] shall have the minor children the following Tuesday and Thursday for dinner.
> >
> > c. During the minor children's weekday visits with [Mother], she shall ensure that they work on their homework to provide for an orderly evening and bedtime at [Father's].
> >
> > d. Any other time agreed to by the parties;
> >
> > e. All exchanges shall occur with [Mother] retrieving and retuning the minor children to

2. In the Contempt Order, the trial court interpreted the Consent Order as providing "joint legal custody of the children between [M]other and [F]ather and primary physical custody for the [Father] . . . with the [M]other exercising secondary physical custody." This is a reasonable description of the Consent Order but is not entirely accurate, as the Consent Order did not expressly award "physical custody" to either party.

> [Father] at the former marital residence, unless alternate arrangements are made.
>
> f. In the event changes are needed to the regular visitation schedule provided for herein, arrangements will be made at least 48 hours in advance via e-mail or text and additional time or changes will be as mutually agreed upon. Both parties agree that neither the regular time sharing schedule nor the holiday time sharing schedule provided for herein will interfere significantly with the children's school attendance.

The Consent Order then sets out detailed provisions for holiday and summer visitation, which

> *shall supersede and take priority over the regular physical custody schedule of the said minor children as set out hereinabove*. By mutual agreement, [Mother] and [Father] may alter these specific holiday dates, time periods, and other restrictions, and both parties agree to work together to arrange appropriate compromises when applicable regarding the following summer and holiday periods and with regard to the children attending summer camp and the like.

The Consent Order specifically sets out the schedule for Christmas, Thanksgiving, Spring Break, and summer vacation. As relevant to this appeal, the Consent Order states the following regarding summer vacation:

> (e) Beginning in 2016, the [Father] shall have summer vacation with the minor children for *at least two non-consecutive weeks during each summer (school) vacation period of the minor children*, as said period is determined by the school the children are attending; however the parties recognize, in the event [Father] travels out of town with the minor children, he may need to have two consecutive weeks for the trip. *The [Father] shall give the [Mother] adequate, written notice of his proposed period of summer vacation for the upcoming summer period, (within 5 days of making the plans) including where he is traveling with the minor children. Beginning in 2016, the [Mother] shall have summer*

> *vacation with the minor children for at least one week during each summer (school) vacation period of the minor children, as said period is determined by the school the children are attending. The [Mother] shall give the [Father] written notice on or before April 1st of each year of her proposed period of summer vacation for the upcoming summer period, so as to allow [Father] to plan the minor children's activities.*

(Emphasis added.)

¶ 5 On 30 August 2019, Mother filed a motion to show cause why Father should not be held in both civil and criminal contempt of court for an alleged violation of the Consent Order. Mother alleged that Father had "willfully failed, refused and neglected to abide by the terms and provisions of [the Consent Order] . . . in that the [Father] ha[d] exercised [an] extra vacation week without the [Mother's] agreement to changing the visitation schedule" after he had already "exercised his two non-consecutive weeks [with the children during their summer vacation]." The district court entered a show-cause order on the same day.

¶ 6 The hearing on civil contempt was held on 21 January 2020.[3] On 20 February 2020, the district court entered an Order for Contempt (the "Contempt Order") finding Father in civil contempt of the Consent Order. The Contempt Order states the following:

> 3. Defendant/Father has willfully violated the [Consent] [O]rder by his own unilateral decision in taking the children for an extra week of vacation against the wishes of Plaintiff/Mother.
>
> 4. As a result of this willful violation the Defendant/Father should be incarcerated for 24 hours to ensure compliance with the [Consent] [O]rder. This sentence shall be suspended so long as the [Father] pays $1,500 in attorney's fees to attorney for [Mother] and arranges for make up visitation for Plaintiff/Mother from Friday October 9, 2020 at 5:30 to Sunday October 11, 2020 at 5:30 PM.
>
> 5. It is, therefore, ORDERED, ADJUDGED AND DECREED that Defendant/Father shall be incarcerated

3. At the January 2020 hearing, Mother stated that she was moving forward only on civil, not criminal, contempt.

> for 24 hours to ensure compliance with the [Consent] [O]rder. This sentence shall be suspended so long as the [Father] pays $1,500 in attorney's fees to attorney for [Mother] within 24 hours of his attorney receiving notice that the order has be[en] signed and arranges for make up visitation for Plaintiff/Mother Friday October 9, 2020 at 5:30 to Sunday October 11, 2020 at 5:30 PM.

Father filed a timely notice of appeal of the Contempt Order on 25 February 2020. This appeal is properly before this Court under N.C. Gen. Stat. § 7A-27(b) (2019).

II. Discussion

A. Interpretation of Consent Order

¶ 7 **[1]** Father first argues that the Consent Order's provisions regarding summer vacation are ambiguous and therefore Father could not have willfully violated the Contempt Order as Mother claims. As a result, according to Father, the trial court erred by finding him in civil contempt. We agree that the Consent Order is ambiguous. Father's interpretation of the Consent Order is at least as reasonable as Mother's proposed interpretation. The Consent Order is not a model of clarity. Because the Consent Order is ambiguous and Father acted in accordance with his reasonable interpretation of the Consent Order, we hold that Father did not willfully violate the terms of the Consent Order.

¶ 8 We review the trial court's conclusions of law in a civil contempt order *de novo*. *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 143 (2009). Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the district court. *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). This Court also reviews a trial court's determination of ambiguity of provisions of a consent order *de novo*:

> Our Court has previously held that, as a consent order is merely a court-approved contract, it is subject to the rules of contract interpretation. Our Court has also stated that, when a question arises regarding contract interpretation, whether . . . the language of a contract is ambiguous or unambiguous is a question for the court to determine. In making this determination, words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible. An ambiguity exists in

> a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations.

Myers v. Myers, 213 N.C. App. 171, 175, 714 S.E.2d 194, 198 (2011) (internal citations and quotation marks omitted).

¶ 9 Where a consent order is "fairly and reasonably susceptible" to the interpretations proposed by both parties, it is ambiguous. *See id.* at 175, 714 S.E.2d at 198 ("An ambiguity exists where the 'language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties.' Stated another way, an agreement is ambiguous if the 'writing leaves it uncertain as to what the agreement was[.]' ") (internal quotation marks omitted) (quoting *Holshouser v. Shaner Hotel Grp. Properties One Ltd. P'ship*, 134 N.C. App. 391, 397, 518 S.E.2d 17, 23 (1999)).

¶ 10 Section 5A-21 of our General Statutes permits the trial court to hold a party in civil contempt if the "noncompliance by the person to whom the [contempt] order is directed is *willful*[.]" N.C. Gen. Stat. § 5A-21(a)(2a) (2019) (emphasis added). "With respect to contempt, willfulness connotes knowledge of, and stubborn resistance to, a court order." *Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000) (citation omitted). In other words, a party's noncompliance is willful only if it is shown by the movant that the party's noncompliance was committed with knowledge of, and stubborn resistance to, the court's directive. *See id.*; *see also Forte v. Forte*, 65 N.C. App. 615, 616, 309 S.E.2d 729, 730 (1983) (citations omitted) ("Wilfulness in matters of this kind involves more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law.").

¶ 11 Here, Mother's contempt motion alleged that Father had "willfully failed, refused and neglected to abide by the terms and provisions of [the Consent Order] . . . in that the [Father] ha[d] exercised [an] extra vacation week without the [Mother's] agreement to changing the visitation schedule" after he had already "exercised his two non-consecutive weeks [with the children during their summer vacation]."[4] At the contempt hearing, Father, the sole testifying witness, stated that during the

4. Although Mother argues on appeal that Father had "engaged in multiple violations" of the Consent Order, Mother's motion for contempt and the Contempt Order itself identify only one violation: Father's third week of summer visitation in 2019. As Mother did not seek to hold Father in contempt for any other alleged violations of the Consent Order, we do not consider her arguments regarding Father's "past history of violations of the [Consent] Order" since this was not presented to the trial court.

children's summer vacation in 2019, he exercised two consecutive weeks with the minor children in Europe and an additional non-consecutive third week of vacation with the children in Nebraska. Father provided Mother with written notice of these summer trips on 22 May 2019. Nonetheless, the trial court concluded that Father had willfully violated the Consent Order by taking the children for an extra week of summer vacation against the wishes of Mother. This was error.

¶ 12 When interpreting an agreement, the court must give the words used "their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible . . . ." *Piedmont Bank & Tr. Co. v. Stevenson*, 79 N.C. App. 236, 241, 339 S.E.2d 49, 52, *aff'd*, 317 N.C. 330, 344 S.E.2d 788 (1986); *Anderson v. Anderson*, 145 N.C. App. 453, 458, 550 S.E.2d 266, 269-70 (2001).

¶ 13 As noted above, physical custody of the minor children during summer vacation is governed by Paragraph 2 of the Consent Order, which supersedes and takes priority over the regular physical custody schedule set out in the Consent Order. Paragraph 2 governs summer visitation "[n]otwithstanding [any] contrary provisions" in the Consent Order. Subsection 2(e) provides Father with custody of the minor children for "*at least* two non-consecutive weeks during each summer (school) vacation period" so long as Father provides "adequate, written notice of his proposed period of summer vacation for the upcoming summer period, (within 5 days of making the plans) including where he is traveling with the minor children." (Emphasis added.) The Consent Order further provides that "in the event [Father] travels out of town with the minor children," he may retain physical custody of the children for "two consecutive weeks for the trip[.]" In addition, the Consent Order states that "both parties agree to work together to arrange appropriate compromises when applicable regarding the . . . summer and holiday periods and with regard to the children attending summer camp and the like[.]"

¶ 14 Father asserts that a "reasonable interpretation of the [summer vacation] provision is that a party cannot have less than the guaranteed minimum time, but he/she may have more by giving timely written notice of his/her 'proposed period of summer vacation for the upcoming summer period.' " Father's interpretation of the Consent Order is based in part upon interpreting the words "at least" to mean "no less than." In other words, Father contends that he is guaranteed *no less than* two non-consecutive weeks with the children during summer vacation, and his weeks must be non-consecutive unless he and the children travel out of the country, and that he may also provide notice of additional summer vacation time if it is non-consecutive to the two other weeks and does not interfere with Mother's designated week with the children.

¶ 15 On the other hand, Mother contends there is "only one reasonable interpretation of the summer vacation provisions" of the Consent Order. Her interpretation is based upon the words "at least," as well, but she interprets this language to mean "no more than." Mother argues that "[e]ach party is *limited* to two weeks and one week vacation respectively, upon proper notice absent the consent of the other party." (Emphasis added.) She argues this interpretation is supported by the use of the words "at least," specifically that the "terms 'at least' used within this provision represent a term of limitation over the [Father's] vacation." Thus, Mother claims that the "only reasonable interpretation" is that Father can have *no more than* two weeks unless she "agrees to extra time but cannot be limited to less than two weeks." Because both parties are allowed "at least" a certain period of summer vacation, Mother contends that the usual interpretation of the words "at least" would lead to the absurd result of a " 'race to notice' vacation time where either party could designate essentially the entire summer as vacation by January 1st of each year." Mother posits that the ability to designate the entire summer as vacation time is contrary to the overall intent of the Consent Order for the parties to share joint custody of the children.

¶ 16 Had Father attempted to designate the entire summer as his vacation time, except for Mother's designated week, based upon the provision granting him "at least" two weeks of summer vacation custody, it may be easier to consider his interpretation of the summer-visitation provisions unreasonable, if not entirely wrong, since taking the entire summer would require Father to claim more than two *consecutive* weeks. But Father's interpretation of the words "at least" as meaning "no less than" is based upon the "usual and ordinary" meaning of the words and is not unreasonable. In the factual context of this case, Father's unchallenged testimony indicated that he and the children had normally taken a vacation to Europe each year, and they went to France and Belgium during the two-week vacation in 2019. In addition, he and the children had normally visited his family in Nebraska each year, and this was the purpose for exercising a third week with the children during the summer of 2019. Again, Father did not attempt to exercise custody over the children for the entire summer, and his interpretation of the summer-visitation provisions is reasonable. Likewise, Mother's interpretation of the summer-visitation provisions as guaranteeing her one week and Father two weeks, but no more unless agreed otherwise, is also reasonable in the context of the entire Consent Order, even though her interpretation is based on using the words "at least" as a term of limitation. This is all to say that the provisions of the Consent Order regarding summer visitation are ambiguous.

¶ 17 Where terms of an agreement are ambiguous, the trial court may consider parol evidence to explain the agreement:

> Our courts, in determining the intent of the parties, look first to the language of the agreement. *See Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) ("If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract"). If a term is ambiguous, parol evidence may be admitted to explain the term. *See Vestal v. Vestal*, 49 N.C. App. 263, 266-67, 271 S.E.2d 306, 309 (1980) ("Although parol evidence may not be allowed to vary, add to, or contradict an integrated written instrument . . . an ambiguous term may be explained or construed with the aid of parol evidence"). A closer examination of the contested provisions of the agreement is therefore warranted to determine if the intent of the parties can be ascertained from the plain language, or if parol evidence could properly be admitted to explain ambiguous terms.

Jackson v. Jackson, 169 N.C. App. 46, 54, 610 S.E.2d 731, 737, *rev'd*, 360 N.C. 56, 620 S.E.2d 862 (2005) (adopting dissenting opinion of Hunter, J., stating that the intent of the parties can be determined by the plain language of the agreement, and any ambiguities creating questions of fact may be properly resolved with the use of parol evidence).

¶ 18 But here, neither party presented any parol evidence to explain or construe their respective interpretations of the terms of the Consent Order. Mother did not testify at the contempt hearing, and Father testified to his understanding of the summer-visitation provisions as allowing him "at least"—meaning "no less than"—two weeks and that since he gave Mother the required notice of his summer plans, which were not in conflict with her week of summer visitation or the children's other summer plans, Father believed he complied with the Consent Order. While Father acknowledged that Mother had objected to the third week of summer vacation, he (reasonably) interpreted the Consent Order as entitling him to the third week of vacation so long as he gave proper notice to Mother. Again, Father's interpretation of the Consent Order was at least as reasonable as Mother's interpretation, and Mother presented no parol evidence to support her interpretation beyond the four corners of the document. In the end, the summer-visitation provisions in the Consent Order are ambiguous, and Father's interpretation of those terms was not unreasonable.

¶ 19 As the Consent Order is ambiguous, the trial court erred by holding Father in civil contempt as he did not willfully violate the Consent Order:

> With respect to contempt, willfulness connotes knowledge of, and stubborn resistance to, a court order. If the prior order is ambiguous such that a defendant could not understand his respective rights and obligations under that order, he cannot be said to have "knowledge" of that order for purposes of contempt proceedings. Due to the ambiguity of the 1983 judgment here, we reverse the trial court's adjudication of contempt.

Blevins, 137 N.C. App. at 103, 527 S.E.2d at 671 (internal citations omitted). Father's uncontested testimony at the contempt hearing demonstrated his genuine, reasonable belief that the summer-visitation provisions in the Consent Order did not require the parties to mutually agree on their proposed summer schedules. And Mother failed to present any evidence suggesting that Father's alleged noncompliance was committed with knowledge of, and stubborn resistance to, the directives set out in the Consent Order.[5] *See id.* at 103, 527 S.E.2d at 671. In short, because Father acted upon his reasonable interpretation of the ambiguous provisions of the Consent Order, we hold that the trial court erred by concluding that Father had willfully violated the Consent Order.

¶ 20 Father also argues on appeal that even if he was not entitled to exercise a third week of visitation under the Consent Order, the trial court erred by holding him in civil contempt because he was in compliance with the Consent Order *before* Mother had filed her motion for contempt. Because his alleged violation was based on a single incident in the past, Father contends the trial court could only find him in criminal, not civil, contempt. However, based upon our holding that the Consent Order provisions regarding summer visitation are ambiguous, we need not and do not address this argument.

B. Attorney's Fees

¶ 21 **[2]** Father also argues that the trial court erred by awarding attorney's fees. We agree.

¶ 22 Although we have determined the trial court erred by holding Father in civil contempt, this holding does not automatically eliminate the issue

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5. Indeed, Mother acknowledges that Father "expressed a belief that the [Consent] Order allowed him to engage in" the very behavior that Mother alleged to be in noncompliance with the same.

of attorney's fees. In some limited circumstances, a party who has filed a contempt motion may recover attorney's fees even where the alleged contemnor cannot be held in contempt at the time of the hearing. In *Ruth v. Ruth*, this Court addressed an award of attorney's fees to a father who sought to hold the mother in contempt for failure to return the children after visitation. *Ruth v. Ruth*, 158 N.C. App. 123, 579 S.E.2d 909 (2003). After the father had filed the motion for contempt, the mother returned the children to the father. *Id.* at 125, 579 S.E.2d at 911. Because the mother had come into compliance with the court's order before the hearing, this Court held that the "district court was without authority to adjudge [the mother] 'to be in willful civil contempt' or to commit her to the custody of the sheriff, even for a suspended sentence, and those portions of the order must be vacated." *Id.* at 126, 579 S.E.2d at 912. However, this Court affirmed the award of attorney's fees to the father because the mother did not come into compliance until *after* the contempt motion was filed:

> As a general rule, attorney's fees in a civil contempt action are not available unless the moving party prevails. Nonetheless, in the limited situation where contempt fails because the alleged contemnor complies with the previous orders after the motion to show cause is issued and prior to the contempt hearing, an award of attorney's fees is proper.
>
> Therefore, that portion of the order requiring plaintiff to pay defendant's North Carolina attorney's fees in the amount of $1,425 is affirmed.

Id. at 127, 579 S.E.2d at 912 (internal citation omitted) (quoting another source). The "limited situation" presented in *Ruth* does not appear and is not applicable in this case. Even if Father's exercise of the third week of visitation had violated the Consent Order, that week of visitation was the sole alleged violation of the Consent Order, and it occurred *before* Mother filed her motion for contempt. There is no legal basis for an award of attorney's fees to Mother in this situation, and, therefore, we vacate the Contempt Order in its entirety.

III. Conclusion

¶ 23 For the foregoing reasons, we vacate the Contempt Order entered 20 February 2020.

VACATED.

Judges TYSON and ZACHARY concur.

WALY v. ALKAMARY

[279 N.C. App. 73, 2021-NCCOA-429]

MOMEN WALY, PLAINTIFF
v.
SOHA ALKAMARY, DEFENDANT

No. COA19-1054

Filed 17 August 2021

1. Appeal and Error—appeal from custody order—motion to dismiss—Appellate Rule violations

A father's motion to dismiss the mother's appeal from a permanent custody order was denied. The mother could not have violated Appellate Rule 7(a)(1), as the father asserted, because that subsection was deleted from the Rules in 2017. Although the mother did violate Rule 28(b)(6) by failing to state the applicable standard of review for some of the issues she raised in her brief, the Court of Appeals chose to hear the appeal because the Rule violation did not impair its ability to review the mother's arguments.

2. Child Custody and Support—jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—parties left the State after initial custody determination

The trial court had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to enter a permanent custody order in a custody action where, after the court entered the first temporary custody order, the parties relocated out of North Carolina. Based on UCCJEA's provisions, the action "commenced" in North Carolina, which had been the child's "home state" for over six months before the father filed his complaint, and the "initial child custody determination" also occurred in North Carolina; thus, the North Carolina court retained its "initial determination" jurisdiction even after the parties left the state.

3. Appeal and Error—Rule 58—child custody action—motion to stay proceedings—oral ruling not put in writing

In an appeal from a permanent custody order, the Court of Appeals lacked jurisdiction to review the mother's argument that the trial court should have stayed the custody proceeding based on North Carolina being an inconvenient forum. Even if the mother's pro se letter to the district court clerk's office had qualified as a proper motion to stay under Civil Procedure Rule 7(b), the trial court never entered a written order memorializing its oral ruling (denying the motion), as required under Rule 58.

4. Child Visitation—father's visitation—lack of compliance by mother—sufficiency of evidence

In a child custody action, where the trial court granted primary custody to the father after having originally given him secondary custody with visitation in a temporary order, competent evidence supported the court's finding that the mother had no interest in fostering a relationship between the father and their daughter and that she had repeatedly violated prior visitation orders—despite numerous requests and contempt motions filed against her—by refusing to let the father visit or speak to the child.

5. Child Visitation—father's visitation—facilitation by mother's sister—finding of fact—sufficiency of evidence

In a child custody action, where the mother had secured a domestic violence protective order (in another state) against the father and therefore placed her sister in charge of coordinating the father's visits with the child, competent evidence supported the trial court's finding that the sister did not want to facilitate the father's visitation and that—given her tendency to unilaterally change the times for phone visits, leaving the father with no alternate means to contact his child—she was no longer the right person to coordinate the visits.

6. Child Visitation—custody action—domestic violence protective order against father—no-contact provision—interference with visitation rights

In a child custody action filed in North Carolina, where the mother later moved to New Jersey and obtained a domestic violence protective order (DVPO) there against the father, the trial court did not improperly use the New Jersey DVPO against the mother when changing primary custody to the father. Evidence supported the court's findings that the mother used the DVPO's no-contact provision to make it harder for the father to coordinate visits with their child. The court also gave the parties a chance to seek clarification from the New Jersey court regarding the no-contact provision before issuing its custody ruling, thereby trying to respect the DVPO's terms. Additionally, the order granting primary custody to the father, which required the parties to communicate indirectly through a secure online application, complied with the DVPO, which deferred to the terms of the father's visitation as ordered in the North Carolina action.

7. Enforcement of Judgments—full faith and credit—domestic violence protective order from another state—child custody action in North Carolina

In a child custody action filed in North Carolina, where the mother later moved to New Jersey and obtained a domestic violence protective order (DVPO) there against the father, the trial court properly gave full faith and credit to the New Jersey DVPO in its permanent custody order granting primary custody to the father. The order required the parties to communicate indirectly through a secure online application to coordinate visitation, and therefore it complied with the DVPO's no-contact provision prohibiting direct contact between the parties. Furthermore, the DVPO specifically deferred to the terms of the father's visitation as originally laid out in the court's prior custody order, which required the parties to communicate in some way to set up visits.

8. Evidence—authentication—screen shots of online video calls—no evidence

In a child custody action, the trial court did not err by declining to admit an exhibit showing screenshots of online video calls between the father and the mother's sister (regarding the father's visitation with the child). The mother failed to properly authenticate the exhibit where she merely described the screenshots as "a scribe between [the father] and my sister" without presenting any evidence that the screenshots were what she claimed them to be.

Appeal by defendant from order entered 27 June 2019 by Judge Edward A. Pone in District Court, Cumberland County. Heard in the Court of Appeals 14 April 2020.

Lewis, Deese, Nance & Ditmore, LLP, by Renny W. Deese, for plaintiff-appellee.

John M. Kirby, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Mother appeals a permanent custody order granting primary custody of her daughter to Father. For the reasons discussed below, we hold the trial court had jurisdiction to enter the custody order under the Uniform Child Custody Jurisdiction and Enforcement Act. We also hold that where Mother did not file a proper motion for a stay of the North

Carolina proceedings, and the trial court did not enter an order ruling on this issue, we have no jurisdiction to consider this argument. The trial court's order requiring the parties to communicate for purposes of coordination of visitation and parenting through Our Family Wizard after Mother's sister was unavailable to serve as a go-between did not fail to give full faith and credit to the New Jersey domestic violence protective order. As Mother failed to authenticate the evidence she contends the trial court should have admitted, the trial court did not err in excluding the evidence. As the trial court's findings of fact were supported by the evidence, we affirm the trial court's order.

I. Background

¶ 2 Mother and Father married in January 2013 and had one daughter, Sandy,[1] in February of 2014. Father filed a complaint for child custody, child support, and attorney withdrawal in Cumberland County District Court on 19 July 2016. On 29 August 2016, Mother filed an answer and counterclaims for emergency custody, a restraining order, custody, child support, alimony, and attorney's fees. Mother alleged that she had traveled to New Jersey with Sandy on 4 June 2016 to visit family and was notified by Father one week later that he wanted to end their marriage. Thereafter, Mother and Sandy moved to New Jersey and Father relocated to Florida.

¶ 3 The trial court entered a temporary child support order directing Father to pay Mother $869.60 per month in child support on 14 October 2016 and a temporary child custody order on 18 October 2016. The parents were awarded joint legal custody with Mother having primary custody and Father having secondary physical custody by way of phased-in visitation. The order established the specific dates for Father's physical visitation with Sandy; granted Father Facetime/Skype/Webcam visitation every Tuesday, Thursday, and Sunday at 6:00 p.m.; and directed Mother and Father to exchange their respective addresses and phone numbers. The order also included a finding "[t]hat the parties should consider that since neither currently resides in Cumberland County, North Carolina: Cumberland County, North Carolina is no longer the most convenient forum for custody litigation."

¶ 4 The trial court entered an interim equitable distribution and post-separation support order on 23 November 2016. On 30 January 2017, Mother filed a motion for contempt alleging that Father violated both

1. A pseudonym is used.

the temporary child support order and the interim equitable distribution and postseparation support order.

¶ 5 On 23 February 2017, Father posted on Facebook: "Nothing is ever forgotten, nothing is ever forgiven. Everything will be remembered, everything will be avenged." In response, Mother filed for a temporary restraining order in New Jersey and advised the New Jersey court of the pending custody case in North Carolina and the temporary custody order. On 11 April 2017, the New Jersey trial court entered a final restraining order ("DVPO") barring Father "from having any oral, written, personal, electronic, or other form of contact or communication with:" Mother. Under the DVPO, Father's visitation with Sandy remained "as scheduled in North Carolina order" with the additional requirements that Father coordinate Facetime visitation with Mother's sister, and the parties exchange Sandy at the New Bridge Police Department.

¶ 6 On 20 July 2017, Father filed a motion for contempt alleging that Mother refused to allow him visitation and Facetime access with Sandy. Father filed an amended motion for contempt on 1 August 2017 and included an additional allegation that Mother refused to provide Father with the phone number and address of her new residence. On 15 August 2017, Mother filed motions for emergency relief, contempt, and attorney's fees.

¶ 7 On 21 December 2017, the trial court entered a holiday visitation order, which awarded Father visitation with Sandy from 21 December to 23 December 2017. The holiday visitation order referenced the DVPO's minor modifications to Father's visitation and found that "[o]therwise, the New Jersey court deferred the terms of [Father's] visitation to this court and the prior order entered by this court." On 26 December 2017, Father filed a motion for contempt, which alleged that Mother's refusal to allow him visitation with Sandy, coupled with her failure to provide her sister's contact information, violated the holiday visitation order. Father also alleged that, in contravention of prior orders, Mother had relocated and refused to provide Father with the address or phone number.

¶ 8 Around 8 January 2018,[2] Mother filed a verified complaint for divorce in New Jersey seeking divorce, alimony, child support, child custody, equitable distribution, and attorney's fees. The complaint included the allegations required by the Uniform Child Custody Jurisdiction and Enforcement Act—respectively North Carolina General Statute

2. The complaint in the record does not have a file stamp and does not indicate the date it was signed. We glean 8 January 2018 from subsequent testimony.

§ 50A-209 ("Information to be submitted to court") and New Jersey Statute Annotated § 2A:34-73(a)(1) (same)—regarding other proceedings between the parties:

> There have been no previous proceedings between [Mother] and [Father] respecting the marriage or its dissolution or respecting the division of property of the parties in any Court except FV-12-1444-17 in connection with a Final Restraining Order issued by this Court in favor of [Mother] against [Father], A-4086-16 in connection with [Father's] appeal of the Final Restraining Order, and File # 16CVD5260 in Cumberland County District Court, NC.

Specifically, Mother requested "[j]udgment against [Father]" on the various claims, including: "[f]or child support;" "[f]or custody of the unemancipated child;" and "[r]egistering and/or granting full faith and credit to the Orders entered in North Carolina[.]"

¶ 9 Mother mailed a letter dated 12 January 2018 to the Cumberland County District Court Clerk's Office entitled "motion to stay North Carolina proceeding." In the letter, Mother explained that she had filed a divorce action in New Jersey and "[a]s a single mom, it's been a financial burden on [her] to still have an attorney in North Carolina, and for the added cost of travel to North Carolina to represent [herself] in court." She asked for the trial court to "please accommodate [her] request to stop all proceedings in North Carolina." The letter was not file-stamped but according to the transcript, Mother handed it to the trial court. There is no indication the letter was served upon Father's counsel until it was discussed during the hearing on 5 March 2018.

¶ 10 On 5 March 2018, the trial court held a hearing on child custody, child support, and contempt. The trial court engaged in an extensive discussion with the parties regarding the issue of jurisdiction, Mother's "motion to stay" letter, and Mother's New Jersey divorce complaint. The trial court stated, "I'm not staying anything here" and [a]s far as I'm concerned, North Carolina law is the law until I say it[']s not or until I talk to a judge up there and we determine what to do." The trial court told Mother to give Father her sister's contact information and to have her attorney in New Jersey contact Father's attorney.

¶ 11 On 14 November 2018, Mother filed her second complaint in New Jersey seeking divorce, child support, back child support, alimony, and custody. The second New Jersey complaint was filed *pro se* on a form complaint entitled "Form 1D: Complaint for Divorce/Dissolution Based

on Irreconcilable Differences." Paragraph 11 of the form instructed: "List any other court cases where you or your spouse/civil union partner are plaintiffs or defendants, such as cases for adoption, bankruptcy, personal injury, child support, custody, domestic violence, etc." Mother listed only "Final restraining order A-4086-16I1," referring to the New Jersey DVPO. She also certified that "[t]he matter in controversy in the within action is not the subject of any other action pending in any court or of a pending arbitration proceeding, nor is any such court action or arbitration proceeding presently contemplated."

¶ 12 On 7 January 2019, Father filed a motion for contempt and a motion for modification of custody. Father alleged that Mother failed to produce verification of her monthly expenses and Sandy's medical records, in violation of a prior order, and alleged a substantial change in circumstances mandated an emergency order awarding Father primary custody of Sandy. Father alleged that Mother neglected Sandy, interfered with Father's relationship with Sandy, failed to obtain necessary medical care for Sandy, was not stable, and was unable to provide for Sandy's needs.

¶ 13 On 5 March 2019, the New Jersey trial court entered an amended DVPO on remand from the appellate division reflecting "that the sole predicate act of domestic violence serving as the basis for the final restraining order . . . is harassment[.]" (Original in all caps.) The no-contact provision in the amended DVPO remained unchanged from the original DVPO. Specifically, the Amended DVPO included the following provision regarding "Parenting time (visitation)": "Parenting will be the same as scheduled in North Carolina order. Pick up/drop off at Old Bridge PD. [Father] to text [Mother's] sister (Sally Alkamary) regarding parenting time only. CS shall be as per North Carolina order." (Original in all caps.) Based upon the record before this Court, the New Jersey court did not change any of the provisions of the DVPO relevant to visitation, did not contact the trial court in North Carolina, and did not make any indication of any proceeding or issue regarding child custody pending in the New Jersey court.

¶ 14 On 11 and 12 March 2019, the trial court held a hearing on termination of post separation support, alimony, and equitable distribution. The trial court entered an order on 9 May 2019. Mother and Father stipulated to the terms of equitable distribution, termination of postseparation support, and dismissal of Mother's alimony claim. Father was awarded Facetime visitation with Sandy on Monday, Wednesday, and Friday between 7:30 and 8:30 p.m. and physical visitation with her 13-14 March 2019 and 16-22 April 2019. The trial court continued the custody hearing until 14 May 2019, finding that "North Carolina has continuing

jurisdiction of the custody matters and has instructed the parties to file the necessary motions in New Jersey to clarify the New Jersey [DVPO] and to ensure that the parties are allowed contact only as it relates to the health and welfare of the minor child." As a result, in order "to have clarification with regard to the provisions of the New Jersey [DVPO] which prohibit any contact between these parties[,]" the trial court postponed entering judgment on custody until 14 May 2019.

¶ 15 Following the 14 May 2019 hearing on custody, the trial court entered an order on 14 June 2019. The trial court found that on 11 and 12 March 2019 it had heard evidence regarding custody and had given "to the parties specific instructions to file the necessary motions in New Jersey to clarify the New Jersey order and to ensure that the parties are allowed contact only as it relates to the health and welfare of the minor child." Despite these instructions, however, the trial court found that "there has been no hearing or subsequent New Jersey order to address" the provisions of the New Jersey Amended DVPO, which prevent Father from any contact with Mother. The court noted its concern that Mother "may and can legally use the provisions of the protective order from New Jersey that she sought and obtained to legally shield [Father] from contact with the minor child and to further alienate the child from [Father]." The trial court also found that it received information that Mother's sister no longer wanted to facilitate Father's visitation with Sandy. The court ordered Mother and Father to appear before the court on 24 June 2019 for entry of judgment and directed Mother to bring Sandy to Cumberland County on that date "so that the child can be in the care of [Father] for an extended visitation[.]"

¶ 16 Following the 24 June 2019 hearing, the trial court entered a permanent custody order. The trial court concluded it was in Sandy's best interest that Father have primary physical custody and Mother have secondary custody in the form of visitation. In regard to the DVPO, the trial court found that it was in Sandy's best interest "for the parties to have contact for the purpose of facilitating visitation and to discuss the welfare of the minor child." (Original underlined.) Mother appeals.

II. Motion to Dismiss

¶ 17 **[1]** On 30 January 2020, Father filed a motion to dismiss Mother's appeal for alleged violations of North Carolina Appellate Rules 7(a)(1) and 28(b)(6). Father argues that Mother's brief "fails to properly cite in the Record the findings or conclusions the trial court made allegedly unsupported by the evidence in violation of Rule 7(a)(1)" and "fails to state a Standard of Review for each issue presented (except the first issue presented) in violation of Rule 28(b)(6)."

¶ 18 As an initial matter, we note North Carolina Appellate Rule 7(a)(1)[3] was deleted in 2017. As a result, Mother could not have violated this rule. *See generally* N.C. R. App. P. 7(a)(1) (2015). As to Father's second argument, North Carolina Appellate Rule 28(b)(6) provides in pertinent part:

> The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.
>
> The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits.

N.C. R. App. P. 28(b)(6). Mother's brief contains a "standard of review" section containing the applicable standard of review for some, but not all, of the issues she advances before this Court. Although "[v]iolation of [Rule 28(b)(6)] may result in dismissal[,]" *State v. Parker*, 187 N.C. App. 131, 135, 653 S.E.2d 6, 8 (2007) (citation omitted), "[w]e also note that our Rules of Appellate Procedure allow for the imposition of less drastic sanctions," *Id.* (citation omitted). Any alleged violations do not impair this Court's ability to review Mother's arguments, so "[i]n this instance, we elect not to take any action." *Wilson v. Pershing, LLC*, 253 N.C. App. 643, 649, 801 S.E.2d 150, 155 (2017).

III. UCCJEA

¶ 19 Mother argues that the trial court "lost jurisdiction because the parents and the child relocated out of North Carolina." (Original in all caps.) Alternatively, Mother contends that the trial court should have stayed the proceedings in North Carolina and never proceeded to the custody trial and permanent custody award.

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3. Prior to its deletion, Appellate Rule 7(a)(1) stated, "[i]f the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall cite in the record on appeal the volume number, page number, and line number of all evidence relevant to such finding or conclusion." N.C. R. App. P. 7(a)(1) (2015).

¶ 20 The Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") has been codified in North Carolina under Chapter 50A of the North Carolina General Statutes. It "provides a uniform set of jurisdictional rules and guidelines for the national and international enforcement of child-custody orders." *Hamdan v. Freitekh*, 271 N.C. App. 383, 386, 844 S.E.2d 338, 341 (2020) (citation omitted). The "Official Comment"[4] to North Carolina General Statute § 50A-101 identifies the purposes of the UCCJEA:

> (1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;
>
> (2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;
>
> (3) Discourage the use of the interstate system for continuing controversies over child custody;
>
> (4) Deter abductions of children;
>
> (5) Avoid relitigation of custody decisions of other States in this State;
>
> (6) Facilitate the enforcement of custody decrees of other States;

Official Comment to N.C. Gen. Stat. § 50A-101 (2019).

A. Initial Child Custody Determination

¶ 21 **[2]** Mother argues that the trial court did not have jurisdiction under the UCCJEA to enter the permanent custody order because after the filing of the action and entry of the first temporary custody order, she moved to New Jersey and Father moved to Florida.

¶ 22 "Whether the trial court has jurisdiction under the UCCJEA is a question of law subject to *de novo* review." *In re J.H.*, 244 N.C. App. 255, 260, 780 S.E.2d 228, 233 (2015) (citation omitted). North Carolina

4. "This Court has noted that the commentary to a statutory provision can be helpful in some cases in discerning legislative intent." *Parsons v. Jefferson-Pilot Corp.*, 333 N.C. 420, 425, 426 S.E.2d 685, 689 (1993).

General Statute § 50A-201, which addresses jurisdiction for initial child custody determinations, provides in pertinent part:

> (a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an *initial child-custody determination* only if:
>
> > (1) *This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State*[.]

N.C. Gen. Stat. § 50A-201 (emphasis added).

¶ 23 The UCCJEA defines " '[h]ome state' " as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7). " 'Initial determination' " is defined as "the first child-custody determination concerning a particular child." N.C. Gen. Stat. § 50A-102(8). " 'Child-custody determination' " is defined as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order." N.C. Gen. Stat. § 50A-102(3). " 'Child-custody proceeding' " is defined as "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue." N.C. Gen. Stat. § 50A-102(4). " 'Commencement' " is defined as "the filing of the first pleading in a proceeding." N.C. Gen. Stat. § 50A-102(5).

¶ 24 Here, the "commencement" of the proceeding was the filing of Father's complaint for child custody in Cumberland County on 19 July 2016. Mother then filed counterclaims, including a custody claim, in the Cumberland County action. At the "commencement" of this "child custody proceeding," North Carolina was clearly the "home state" of the child, as the child had resided in North Carolina for more than six months. N.C. Gen. Stat. § 50A-102 (4), (5), and (7). Mother does not dispute that North Carolina was the home state at the commencement of the proceedings; she contends the trial court "lost jurisdiction after it issued the temporary custody order and all of the parties permanently left the State for more than six months."

¶ 25 However, "[o]nce jurisdiction of the [trial] court attaches to a child custody matter, it exists for all time until the cause is fully and completely determined." *In re Baby Boy Scearce*, 81 N.C. App. 531, 538-39, 345 S.E.2d 404, 409 (1986) (citations omitted). Here, the custody action was commenced in North Carolina. Even though Father, Mother, and child all moved out of the state shortly after the initiation of the suit, under the circumstances of this case North Carolina retained its jurisdiction under the UCCJEA until the conclusion of the custody matter. *See id.* This continuity promotes the UCCJEA's purpose of "[a]void[ing] jurisdictional competition and conflict with courts of other States[.]" Official Comment to N.C. Gen. Stat. § 50A-101.

¶ 26 Contending that the "Permanent Custody Order was a modification of the temporary custody order[,]" Mother argues "[t]he controlling North Carolina statute is G.S. § 50A-202[.]" North Carolina General Statute § 50A-202, which addresses "[e]xclusive, continuing jurisdiction[,]" states:

> (a) Except as otherwise provided in G.S. 50A-204, a court of this State which has made a child-custody determination consistent with G.S. 50A-201 or G.S. 50A-203 has exclusive, continuing jurisdiction over the determination until:
>
> > (1) A court of this State determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
> >
> > (2) A court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.
>
> (b) A court of this State which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under G.S. 50A-201.

N.C. Gen. Stat. § 50A-202. North Carolina General Statute § 50A-203, which governs "[j]urisdiction to modify determination," provides:

> Except as otherwise provided in G.S. 50A-204, a court of this *State may not modify a child-custody determination made by a court of another state* unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) and:
>
> > (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
> >
> > (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203 (emphasis added). The Official Commentary to North Carolina General Statute § 50A-203 explains that Section 203 "complements Section 202 and is addressed to the court that is confronted with a proceeding to modify a custody determination of another State." Thus, North Carolina General Statutes §§ 50A-202 and 50A-203 apply to "modification" jurisdiction, whereas North Carolina General Statute § 50A-201 applies to "initial determination" jurisdiction. In this case, the trial court was not exercising modification jurisdiction because it was not considering modifying "a child-custody determination *made by a court of another state[.]*" N.C. Gen. Stat. § 50A-203 (emphasis added). After Father's commencement of the custody action in the trial court, North Carolina retained its "initial determination" jurisdiction. Because North Carolina was the "home state" of Sandy for more than six months before Father filed the custody action in Cumberland County, North Carolina had jurisdiction to enter the permanent custody order, and North Carolina General Statute § 50A-202 is not the "controlling statute" under these facts.

¶ 27 Mother contends that New Jersey had jurisdiction simply because she and Sandy had moved to New Jersey and Father had moved to Florida. But based upon the record before this Court, Mother apparently never attempted to have the New Jersey court exercise jurisdiction over custody, despite the trial court's efforts encouraging the parties to consider if New Jersey may be a more appropriate forum for the case and continuing the custody hearing to give Mother time to address the issue in New Jersey. Mother did obtain a DVPO in New Jersey, and

the provisions of the DVPO and Amended DVPO addressed communication and contact between Mother and Father for purposes of visitation, but as the trial court noted, New Jersey had deferred to the North Carolina court as to the custody determination, specifically noting in both orders, "Parenting will be the same as scheduled in North Carolina order." (Original in all caps.) We also note that Mother had filed separate actions in New Jersey including claims for child custody, but the action filed in 2018 was dismissed. The action Mother filed *pro se* in 2019 did not comply with the UCCJEA as it did not identify the North Carolina child custody proceeding as required by New Jersey Statutory Annotated § 2A:34-73(a)(1). *See* N.J. Stat. Ann. § 2A:34-73(a)(1) (West 2019) ("[The pleading or affidavit shall state whether the party] has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number of the proceeding, and the date of the child custody determination, if any[.]").

¶ 28 If Mother had taken the appropriate actions and filed the appropriate motions or pleadings, it is possible that North Carolina may have declined to exercise jurisdiction on the basis of an "inconvenient forum" determination pursuant to North Carolina General Statute § 50A-207. But, as discussed below, the trial court declined to make such a determination at the 5 March 2018 hearing.

B. Stay of Custody Proceedings

¶ 29 **[3]** Alternatively, Mother argues that the trial court "should have stayed custody proceedings due to convenience to the parties and witnesses." (Original in all caps.) Specifically, Mother contends because the trial court "determined as of 14 October 2016 that 'North Carolina is no longer be [sic] most convenient forum for custody litigation[,]' . . . even if North Carolina had jurisdiction, the [trial court] should have stayed the action in March 2018 on [Mother's] motion, and should not have proceeded to a custody trial and custody award in 2019."

¶ 30 Here, at the 5 March 2018 hearing, the trial court engaged in an extensive discussion with Father's counsel, Ms. Hatley, and Mother regarding jurisdiction and Mother's request to stay the North Carolina proceedings:

> THE COURT: He lives in Florida and she lives in New Jersey?
>
> MS. HATELY: That's correct.
>
> THE COURT: Why are we here?

> MS. HATLEY: Because the -- this Court had jurisdiction –
>
> . . . .
>
> MS. HATLEY: --at the time of the filing, Your Honor and
>
> THE COURT: And then everybody moved
>
> MS. HATLEY: That's correct. And we only have temporary orders, which are not being complied with. So at this point, you have jurisdiction.

Mother explained that she had a DVPO against Father from New Jersey and that she had counsel in New Jersey, but not North Carolina. As to the complaint Mother filed in New Jersey for divorce, equitable distribution, child support, and child custody, Ms. Hatley explained:

> I'm aware of the restraining order. That is up on appeal. I'm aware that she's filed for divorce in New Jersey as well as overseas in their home of origin, the country of origin that these parties are from. So there are attorneys that have been involved in those cases, but no other state has assumed jurisdiction of the custody, and no other state has assumed jurisdiction of any of these spousal support or property issues.

The court then addressed the letter Mother sent to the trial court entitled "motion to stay."

> THE COURT: And you've not had any contact from this attorney in New Jersey?
>
> MS. HATLEY: No, Your Honor. No one has given me a single call. Nor has there been a proper motion to -- to release jurisdiction on the transfer (inaudible) this court.
>
> THE COURT: *It's not in the file, but there is – there's something here that she has written that she just handed up entitled a Motion to Stay (inaudible) proceeding dated January 12 of 2018.*
>
> [MOTHER]: I am -- have a copy, yeah, in here.
>
> MS. HATLEY: Your Honor, I'm not sure a Motion to Stay is the appropriate motion.

[MOTHER]: Yeah. I am here copy. I need to have copy, yeah. I am a copy of -- I (inaudible) a copy from Stay of Motion prepared on the court. I have (inaudible).

THE COURT: *Let Ms. Hatley see those and then hand those back to her*. Well, you probably want to tell them to tell your lawyer that everything is pending down here and that this one was filed first. So when the judge up there talks to me, this is the court where it's going to happen. And your lawyer needs to get in touch with Ms. Hatley. Because it just doesn't happen like this. And I'm concerned about some of the things that are in here, particularly (inaudible) that there have been no previous proceedings between plaintiff and defendant respecting the marriage dissolution or respecting the division of property of the parties in any court except as was entered in the restraining order, which is not exactly accurate because this case has been pending for quite a while. So they should have known about this. And they requested relief for alimony, support, custody, equitable distribution. And as I look at my docket, I have custody, support, ED all here. So North Carolina at this point is the appropriate place for this to happen because this is where it was instituted. Now, as I read -- this was granted in the order also, if the Court to grant custody to her, (inaudible) to us on what to do thereafter.

MS. HATLEY: Your Honor, if it's like our 50(b) and 50(a), I would -- I would argue to the Court that 50(a) controls and the custody order of this court would control.

THE COURT: As far as I'm concerned, North Carolina law is the law until I say it's not or until I talk to a judge up there and we determine what to do. Okay.

. . . .

THE COURT: I'm concerned more about the restraining -- the restraining order is their issue. Apparently he went up there and submitted to the jurisdiction, so that is what it is. But the custody and all these other issues are still proper over here, at least for the present time. Hand those back to her, please. Yeah, Ms.

Hatley, there is a – what's -- what is denominated as a Motion to Stay, filed January 18th. It's all in here.

MS. HATLEY: Was that signed by her or was that signed by the New Jersey attorney, Your Honor?

THE COURT: I think -- it appears that she mailed it. She has her tracking number there and that apparently came to the clerk and it was placed in the file.

MS. HATLEY: Because I know we would have to be heard on the motion to stay and ask that that be denied at this point.

THE COURT: I'm not staying anything in here.

MS. HATLEY: Wonderful.

THE COURT: I can tell you that right now. I'm not doing that. I'm not – I'm not saying it won't subsequently be released to New Jersey. I'd have to talk to a judge up there and see exactly what they've done. They're probably about like us, so. . . Well, I did hear you at one point say you were going to get an attorney for down here now again. When do you intend to do that?

[MOTHER]: I am -- I haven't done it because I have -- I don't have money to attorney here and I –

THE COURT: Well, let me start by saying you probably want to talk to your lawyer up there and let them know to get in touch with Ms. Hatley forthwith, that means right away, so that – you've got a lawyer –

[MOTHER]: Okay.

THE COURT: -- up there.

[MOTHER]: Yes.

THE COURT: This case started down here.

[MOTHER]: Yes.

THE COURT: And we are here. I have not relinquished jurisdiction in the case. North Carolina still has control. Also tell your lawyer that if he does not get in touch with Ms. Hatley very, very soon, this Court may be issuing additional orders.

> [MOTHER]: Okay.
>
> THE COURT: Okay. All right. *And your court has already deferred to us in terms of the visitation and all of that*, so --while you all sort out the restraining order.

(Emphasis added.)

¶ 31 Mother contends the trial court should have treated her letter as a formal motion for stay under North Carolina General Statute § 50A-207 and that the trial court erred by not granting a stay based on North Carolina being an inconvenient forum. "The decision to relinquish jurisdiction to another state on the basis of more convenient forum is reviewed for an abuse of discretion." *In re M.M.*, 230 N.C. App. 225, 228, 750 S.E.2d 50, 52-53 (2013) (citation omitted). North Carolina General Statute § 50A-207 provides:

> (a) A court of this State which has jurisdiction under this Article to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.
>
> (b) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:
>
> (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (2) The length of time the child has resided outside this State;
>
> (3) The distance between the court in this State and the court in the state that would assume jurisdiction;
>
> (4) The relative financial circumstances of the parties;

> (5) Any agreement of the parties as to which state should assume jurisdiction;
>
> (6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
>
> (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (8) The familiarity of the court of each state with the facts and issues in the pending litigation.
>
> (c) If a court of this State determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, *it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.*
>
> (d) A court of this State may decline to exercise its jurisdiction under this Article if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

N.C. Gen. Stat. § 50A-207 (emphasis added).

¶ 32 Here, Mother did not file a motion requesting a stay, but the trial court addressed her letter at the hearing. The trial court, however, did not memorialize its oral ruling that "I'm not staying anything here" in a written order. In North Carolina, "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court," N.C. Gen. Stat. § 1A-1, Rule 58 (2019), and "[t]he entry of judgment is the event which vests this Court with jurisdiction[,]" *Worsham v. Richbourg's Sales & Rentals, Inc.*, 124 N.C. App. 782, 784, 478 S.E.2d 649, 650 (1996) (citation omitted). Thus, even if we were to assume Mother's letter could be considered as a proper motion to stay proceedings pursuant to Rule 7(b) of the North Carolina Rules of Civil Procedure, because the trial court never entered an order ruling Mother's "motion to stay" letter, this Court does not have jurisdiction to determine whether the trial court abused its discretion by not granting a stay. *See id.*

¶ 33 Rule 7(b) of the North Carolina Rules of Civil Procedure provides:

> (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.
>
> (2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

N.C. Gen. Stat. § 1A-1, Rule 7(b) (2019). At the hearing, the trial court indicated that Mother's letter was "filed January 18th" and "it appears that she mailed it," explaining "[s]he has her tracking number there and that apparently came to the clerk and it was placed in the file." The letter was not filed stamped or served on Father's counsel prior to the hearing, nor did it identify any legal basis for the trial court to stay its proceedings. Thus, Mother's purported motion did not comply with the Rules of Civil Procedure.

¶ 34 As the trial court did not enter an order ruling upon Mother's purported motion, we have no jurisdiction to consider Mother's argument. However, we appreciate the trial court's efforts to address Mother's contentions, even in the absence of a motion. The trial court engaged in an extensive discussion regarding its jurisdiction and did not rule out the prospect that jurisdiction could be transferred to New Jersey in the future stating, "I'm not saying it won't subsequently be released to New Jersey. I'd have to talk to a judge up there and see exactly what they've done." The trial court explained its concern that Mother, in her divorce action in New Jersey, certified

> there have been no previous proceedings between plaintiff and defendant respecting the marriage dissolution or respecting the division of property of the parties in any court except as was entered in the restraining order, which is not exactly accurate because this case has been pending for quite a while. So they should know about this. And they requested relief for alimony, support, custody, equitable distribution. And as I look at my docket, I have custody, support, ED all here.

¶ 35 The trial court's statements reflect its consideration of certain factors enumerated in North Carolina General Statute § 50A-207(b), including: "[t]he nature and location of the evidence required to resolve the pending litigation, including testimony of the child;" "[t]he ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence;" and "[t]he familiarity of the court of each state with the facts and issues in the pending litigation." N.C. Gen. Stat. § 50A-207(b)(6)-(8). The trial court also discussed and allowed Mother to present evidence as to "[w]hether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child" and "[t]he relative financial circumstances of the parties[.]" N.C. Gen. Stat. § 50A-207(b)(1), (4). Indeed, Mother was given specific directions on what actions to take for the trial court to consider making a determination that North Carolina was an inconvenient forum and transferring jurisdiction to New Jersey.

IV. Compliance with Visitation Order

¶ 36 **[4]** Mother argues that the trial court "erred in finding that [she] had not complied with visitation orders and had frustrated internet and phone visitation." (Original in all caps.) She contends that the trial court's order "fails to provide a factual basis for a finding that the mother did not comply with visitation orders, or that she failed to foster a relationship between the child and father; and these findings are contrary to the evidence regarding visitation."

> In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Unchallenged findings of fact are binding on appeal. The trial court's conclusions of law must be supported by adequate findings of fact. . . . Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal.

Peters v. Pennington, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citations and quotation marks omitted).

¶ 37 Mother challenges the following findings of fact:

> 42. Since the date of separation she has not fostered a relationship and has willfully withheld visitation.

43. She has not made any genuine efforts to foster that relationship and there is a substantial likelihood that this may continue into the foreseeable future.

. . . .

45. [Mother] has made numerous efforts to circumvent and violate this court's orders as to visitation with [Father] and to otherwise delay the matter.

46. She has resisted allowing the father to visit and to otherwise have contact with the minor child.

47. She has used the New Jersey DVPO as a means of avoiding the father having any contact with her and relegating his efforts to exercise his visitation contingent upon his contact with relatives of the mother.

. . . .

50. It is clear to this court she does not intend to foster a relationship with [Father] and to award her primary custody would likely result in constant and continuous violations and further alienating the Plaintiff father from the minor child.

. . . .

59. She was ordered by the Court in December 6, 2016, to allow Christmas visitation in December, 2017 beginning December 21, 2017, and she willfully failed to do so.

60. The Father was authorized to have facetime, skype and other telephonic communication with the minor child and the mother willfully refused to comply.

. . . .

62. She offered excuses which were not valid and continued to not comply resulting in numerous contempt motions being filed and more requests at preliminary hearings.

. . . .

64. [Father] has had to come to court each time to enforce compliance and to get additional visitation. She has repeatedly refused to comply with the orders.

Mother contends the challenged findings of fact are "repetitive, conclusory, and generalized" and without "specific factual context[.]" Mother asserts that "[l]ooking at the actual evidence regarding visitation, the record shows that the [Father] had full physical visitation with the child in conformity with the temporary custody orders, with two exceptions."

¶ 38 The record evidence supports the trial court's findings of fact regarding Father's visitation. At the 11 March 2019 hearing, Father testified that from June of 2016 to March of 2017, Mother "wo[uldn't] let [him] speak to [his] daughter." After he "unsuccessfully tried several times to speak to [his] daughter, [he] hired an attorney in North Carolina and [he] attempted to get a court order to go see [his] daughter." After detailing the specific instances when Mother refused to allow him the visitation ordered by the trial court, Father explained that "25 percent of the time [he] was successful to see [his] daughter" and "[t]he other 75 percent [Mother] refused." According to Father, the trial court's directive that he communicate with Sandy via Skype three days a week at 6:00 p.m. "has been fulfilled 50 percent of the time" and during those times, Sandy was located at the mall or park and "doesn't want to pay attention to talk to [him,]" which Father believed Mother was doing intentionally "so to limit [his] interaction with [his daughter] on purpose." He testified about the difficulties arising from Mother's sister's facilitation of Skype visitation and noted that "the bottom line is every single visitation there is harassment of some sort" and "[e]very single visitation" he "had to get a court order, because otherwise [he didn't think [he] would be able to." Moreover, in a finding of fact not challenged by Mother, the trial court found that "[t]he New Jersey Appellate Court noted that the trial court chastised the mother for not complying with this Court's custody order. He admonished her that it was wrong to interfere with the father's visitation time." *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." (citations omitted)).

¶ 39 Mother's assertion that she had fully complied with the visitation orders with the exception of two occasions goes to the trial court's assessment of the weight and credibility of the evidence, which is in the purview of the trial court:

> A trial judge passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. . . . It is clear beyond the need for multiple citation that the trial judge, sitting without a jury, has discretion as

> finder of fact with respect to the weight and credibility that attaches to the evidence. The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.

Phelps v. Phelps, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) (citations and quotation marks omitted). Here, the trial court did not have to believe Mother's version of the facts. The findings of fact made by the trial court are supported by competent evidence.

V. Sister's Facilitation of Visits

¶ 40 **[5]** Mother asserts the trial court "erred in finding that [her] sister did not want to facilitate visitation." (Original in all caps.) The trial court made the following pertinent findings of fact regarding Mother's sister's facilitation of Father's visitation:

> 73. The evidence clearly shows that the sister recently changed the times for the skype or phone contact unilaterally leaving the father with no choice but to accept the change or wait until he could get back into court.
>
> . . . .
>
> 77. This Court has no jurisdiction over the sister, a nonparty to this action. Consequently, the coordination with her for visitation is not appropriate.
>
> 78. Moreover, she (the sister) has already unilaterally changed the time leaving the father without recourse. He can't contact the mother otherwise and this court lacks the power to order the sister to act accordingly.
>
> 79. Moreover, at the court session on May 14, 2019, the court received information from [Father] through counsel that the sister was no longer willing to supervise the visits.

¶ 41 Mother challenges Finding of Fact 79 and argues "[t]here was no testimony that [her] sister was not willing to help with the visits" and the trial court "appears to have not only relied on arguments of [Father's] counsel to support its order, but it seems to have ignored [Mother's] counsel's response to this." She asserts that "[i]n view of the importance

of this issue of [Mother's] sister facilitating visitation, this finding was error and requires reversal."

¶ 42 However, Finding of Fact 79 was supported by evidence. At the 14 May 2019 hearing, the following exchanges occurred between Ms. Hatley and Mother's counsel, Ms. White:

> MS. HATLEY: What I can say to the Court is my client has indicated that to his knowledge nothing has changed with regard to the restraining order in New Jersey, and that the sister who had been coordinating is no longer willing to be involved in that. So that puts us kind of where I know the Court was afraid that we would –
>
> . . . .
>
> MS. WHITE: . . . . The other issue is in regards to communication between the parties. It was indicated by Attorney Hatley earlier that her client hasn't been able to talk to the child. Your Honor, my client did bring in a copy of the logs and it does show that he's had numerous phone calls.
>
> MS. HATLEY: Your Honor, that was not my representation. My representation was that the sister who was facilitating does not wish to be involved any further.
>
> MS. WHITE: Okay. And that is – that is not what is indicated from me. It's just the sister is a dentist, as we described before, and she does have specific times that she's available. And calls have still been made since that time.

¶ 43 Finding of Fact 79 finding reflects Father's counsel's statement to the court that Father "indicated that to his knowledge" "the sister who had been coordinating is no longer willing to be involved in that." The trial court did not find as fact that Mother's sister was unwilling to supervise visits. Finding of Fact 79 is supported by evidence.

¶ 44 Moreover, it was not necessary for Mother's sister personally to come to a hearing in North Carolina and testify that she no longer wanted to facilitate visitation, as she was not a party subject to the district court's jurisdiction. The trial court had no authority to direct Mother's sister to do anything. Father presented evidence regarding his difficult experiences with attempting to facilitate visitation through Mother's

sister. The sister's actions and Father's inability to exercise visitation as ordered tend to indicate that the sister was either unwilling or unavailable to facilitate visitation as needed. Even if Mother's sister had been amenable to facilitating visitation, there was no abuse of discretion in the court finding she was not appropriate for the role in light of the unchallenged findings of fact based upon Father's actual experience in attempting to coordinate visitation through Mother's sister. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

VI. DVPO

¶ 45 Mother contends that the trial court "erroneously used the New Jersey DVPO against" her and "failed to give full faith and credit to the DVPO." (Original in all caps.) In its order entered 27 June 2019, the trial court made the following findings of fact regarding the DVPO:

> 25. The Defendant Mother filed for and obtained a DVPO in the State of New Jersey. A hearing was held and a permanent order was entered April 11, 2017. This order was granted and remains in effect. The New Jersey court has now directed that the visitation be as indicated by the North Carolina Court.
>
> 26. The New Jersey Court found that she moved to New Jersey around November, 2016 and did not disclose to [Father] her location.
>
> 27. This Court notes that while it is very clear that North Carolina was the Home State at the time of filing, the testimony offered here today does conflict with some of the facts found as indicated in the NJ case.
>
> 28. It is also clear that the alleged acts of physical domestic violence allegedly occurred in North Carolina. The case in fact went to the New Jersey Appellate Court and was remanded to the trial court for further orders.
>
> 29. One of the major issues on the appeal was to clarify that the act of domestic violence found was not a physical assault or physical domestic violence, but what was described as a threat. While the Defendant Mother testified as to alleged physical assault, that was not the finding of the trial court as to the reason for the DVPO.

30. The corrections were made to correct the order and the order was filed. That order has now been entered and the DVPO is a permanent one in full force and effect.

31. The DVPO order has a specific no contact provision as it relates to the father and the mother. The order was entered based upon a Facebook post on the father's Facebook page, not as a result of any actual physical violence nor any direct threat sent by the father to the mother. The Court found that even though he didn't send the item to her and she was not his friend on Facebook, the information could find its way to her.

32. The item posted stated: "Nothing is ever forgotten, nothing is ever forgiven. Everything will be remembered, everything will be avenged."

33. The New Jersey order further indicated a section awarding temporary custody to the mother, presumably consistent with this Court's order.

. . . .

44. The New Jersey Appellate Court noted that the trial court chastised the mother for not complying with this Court's custody order. He admonished her that it was wrong to interfere with the father's visitation time.

. . . .

47. She has used the New Jersey DVPO as a means of avoiding the father having any contact with her and relegating his efforts to exercise his visitation contingent upon his contact with relatives of the mother.

. . . .

72. The mother now has a Domestic Violence Protective Order that prohibits the father from having contact with her. The Father is required to contact a non-party sister of [Mother] to facilitate the contact and the visitation.

73. The evidence clearly shows that the sister recently changed the times for the skype or phone contact unilaterally leaving the father with no choice but to accept the change or wait until he could get back into court.

74. The Mother's failure to abide by the Court's Orders coupled with the DVPO no contact order and the requirement therein that he contact a nonparty relative to coordinate his visitation are all problematic in this case.

75. This further complicates matters in that the father cannot contact the mother to express his unhappiness and the violation of the order as he is prohibited from having contact with her.

76. This allows the ·mother to withhold and deflect reasons as to why the visitation did not occur.

77. This Court has no jurisdiction over the sister, a nonparty to this action. Consequently, the coordination with her for visitation is not appropriate.

78. Moreover, she (the sister) has already unilaterally changed the time leaving the father without recourse. He can't contact the mother otherwise and this court lacks the power to order the sister to act accordingly.

79. Moreover, at the court session on May 14, 2019, the court received information from the Plaintiff through counsel that the sister was no longer willing to supervise the visits.

80. The New Jersey court rightly determined that these parties will have to interact as a result of the minor child for the next "many, many years." The trial court further indicated the parties would have to see each other "continuously or at least come into contact" as it relates to dealing with the minor child through the years.

81. Unfortunately, the no contact provision is problematic for the Plaintiff father. It places him in a significant dilemma.

82. A fair reading could expose him to contempt and/or criminal prosecution for contacting the mother in reference to the visitation or the status of the minor child while in his care.

83. Moreover, it could be used as a spear or a shield by the defendant mother, and she has clearly demonstrated a propensity to thwart his visitation and further alienate him from the minor child.

84. Consequently, this court directed the parties, specifically the Defendant Mother, to return to the New Jersey Court to have the provision removed and/or clarified to specifically allow contact for the purposes of complying with this Court's Custody Order.

85. The Court has now determined that the no contact order remains in effect and this is a barrier to the Plaintiff Father's ability to visit with and co-parent his minor child.

86. The restraining order may provide the mother with a legal basis to thwart the father's efforts to visit with, contact, locate or otherwise have a relationship with his child.

87. The sister has now changed the time for telephone calls. The father cannot contact the mother to complain. This Court lacks jurisdiction over the sister and this is fundamentally unfair to the Plaintiff father in this matter.

. . . .

102. To be clear, the order being entered today posed a very difficult decision for the Court. It is not one the court enters lightly. Had the Defendant Mother complied with this court's orders and made the effort to accommodate the visitation with the father, the Court well likely would have placed primary custody with her. However, the use of the DVPO to essentially hide behind, the failure to foster the relationship and follow the court orders as to visitation and her repeated attempts to shift the focus to the DVPO, all led to the inescapable conclusion that she has little if any intention to foster a relationship with the father.

. . . .

104. In fact, during the entrance of the order in Court today, the Court directed the parties to disclose their addresses and contact information for purposes of facilitating contact and arrange for visitation and effectuation of the order and the Defendant Mother was reluctant to provide her email due to the New Jersey order. This clearly demonstrates the dilemma and her continued resistance.

105. The New Jersey DVPO order does provide that the visitation be as indicated by the North Carolina Court. The Court enters this order and specifically finds it is in the best interest of the minor child for the parties to have contact for the purpose of facilitating visitation and to discuss the welfare of the minor child.

. . . .

109. It is in the best interest of the minor child that the parties communicate through the Our Family Wizard mode and the cost will be borne by the Plaintiff Father.

A. Use of DVPO Against Mother

¶ 46 **[6]** Mother contends that the trial court "erroneously used the New Jersey DVPO against" her. (Original in all caps.) She argues "[t]he rationale of the District Court raises very serious public policy concerns pertaining to domestic violence" and "[i]n yet another odd twist, the District Court actually directed [her] to go back to the New Jersey proceeding to have it modified to provide for communication between the parties to accommodate visitation."

¶ 47 The order is replete with findings about the effects of the DVPO on Father's visitation. Mother asserts that Findings of Fact 47, 76, 86, and 102 are "inexplicable" because "[i]t is entirely unclear the manner in which [she] is using or abusing the DVPO to avoid visitation." However, the trial court's unchallenged findings of fact establish the harmful way that Mother utilized the DVPO to her advantage in terms of Father's visitation. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. Additionally, record evidence supports these findings. For example, at the 12 March 2019 hearing, Father stated that Mother filed an action on 14 November 2018 in New Jersey for divorce, support, equitable distribution, and "to

have New Jersey assume jurisdiction, even after [the trial court] told her that was not appropriate." In the complaint, Mother certified that the *only* action she and Father were parties to was the domestic violence proceeding and did not direct the New Jersey court to the ongoing North Carolina proceedings. According to Father, by not alerting the New Jersey court of the trial court's visitation orders, Mother "makes every effort to keep this restraining order so that my client can't have any contact with her in place."

¶ 48 Additionally, the trial court took affirmative steps to *not* use the DVPO against Mother. At the March 12, 2019 hearing on custody, termination of post separation support, alimony, and equitable distribution, the trial court explained it "c[ould not] deal with" the no contact provision because it as was "a New Jersey issue." Accordingly, the trial court stated from the bench:

> I also indicated to them, as I've indicated in the record, that the restraining order issued in New Jersey, because of the way it is written and prohibiting contact, specifically prohibiting the plaintiff father from having contact with the defendant mother, is problematic for this Court. It potentially puts him at risk for criminal charges by simply following this order. I do not believe that was the intent of the New Jersey court, but I cannot glean that, or how they would interpret it, from a reading of the order. Consequently, it will be incumbent upon the parties to file an appropriate matter in the New Jersey court to get the no-contact order lifted or to be advised that it is this Court's intention to allow contact between the parties for the purposes of visitation and the best interest of the minor child as this Court does in the usual domestic orders. So they can either remove that provision or place some clarifying language so that it will be clear that to the extent the parties have contact with regard to following this order that the Court will enter they will not be in violation or he will not be in violation of the restraining order.

¶ 49 The court continued the hearing for the limited purpose of allowing the parties to seek clarification of the order, specifically finding that it "will enter judgment as to the issue of child custody on May 14, 2019 and hopes to have clarification with regard to the provisions of the New Jersey order which prohibit any contact between these parties by that

date." Mother apparently failed to take any action as anticipated as the basis for the continuance. At the 14 May 2019 hearing, Mother's counsel stated, "I don't have a status on whether a court date has been scheduled." Thus, despite the court's directives, Mother took no action.

¶ 50 Moreover, the North Carolina custody order is not inconsistent with the DVPO and does not lessen Mother's protection. The DVPO provided that Father was to text Mother's sister "regarding parenting time only" and also provided that "[p]arenting will be the same as scheduled in North Carolina order. Pick up/drop off at Old Bridge, P.D." (Original in all caps.) The North Carolina order would necessarily allow the parents to communicate as needed for the visits to happen, particularly where the parties do not live in the same state. The only method of communication identified by the New Jersey DVPO was mother's sister, and the evidence before the trial court indicated that Mother's sister was no longer willing or available to facilitate visitation. Thus, since Mother's sister could no longer be the intermediary for communications, the trial court ordered for the parties to communicate through Our Family Wizard at Father's expense.

¶ 51 Use of Our Family Wizard to facilitate and document communications between Mother and Father is entirely consistent with the Amended DVPO. Our Family Wizard is an online application which provides tools to facilitate communications between parents, including a message board and calendar. Our Family Wizard does not require the parents to communicate directly with one another but provides a secure platform to share messages, and the messages cannot be edited or deleted after they are sent, thus providing a record for the court, if needed. Use of Our Family Wizard for coordination with Father provides Mother a far more secure method of communication with Father than using her sister as a go-between. This argument is without merit.

B. Failure to give Full Faith and Credit to DVPO

¶ 52 **[7]** Mother argues that "[i]n addition to using the New Jersey DVPO against [her], the lower court also failed to honor that order. The court, in effect, modified the terms of the DVPO, and further distorted the facts that led to the DVPO. In doing so the lower court failed to give full faith and credit to the DVPO as required by federal law."

¶ 53 The Full Faith and Credit Clause "requires that the judgment of the court of one state must be given the same effect in a sister state that it has in the state where it was rendered." *State of New York v. Paugh*, 135 N.C. App. 434, 439, 521 S.E.2d 475, 478 (1999) (citation omitted). "We review *de novo* the issue of whether a trial court has properly

extended full faith and credit to a foreign judgment." *Marlin Leasing Corp. v. Essa*, 263 N.C. App. 498, 502, 823 S.E.2d 659, 662-63 (2019).

¶ 54 Here, the trial court did not modify the DVPO, and the custody order does not alter the effect of the DVPO. The DVPO specifically deferred to the trial court's custody order by explicitly stating, "parenting will be the same as scheduled in North Carolina order." (Original in all caps.) There is no evidence that the trial court failed to honor the DVPO; indeed, as discussed above, the trial court accommodated the restrictions of the DVPO by ordering communications through Our Family Wizard after Mother's sister was no longer available to facilitate communications. The trial court was not required to give the parties opportunities to seek modification of the no contact provisions of the New Jersey DVPO, but the trial court did give them this opportunity. As the parties failed to take advantage of this opportunity, the trial court ordered communications through Our Family Wizard. Father is still not allowed to contact Mother directly, as required by the DVPO.

VII. Exclusion of Mother's Exhibit

¶ 55 **[8]** Finally, Mother contends the trial court erred by not admitting screenshots of Skype calls allegedly between her sister and Father because the "[s]creenshots are admissible, and it is not necessary that the account holder authenticate the screen."

¶ 56 Mother is correct that screenshots *can* be admissible evidence, but this evidence still must be authenticated. At the 11 March hearing, Mother sought to introduce what she described as "a scribe between [Father] and my sister" into evidence. Father objected and the trial court allowed his motion to strike the evidence. In the record before this Court, Mother has included the screenshots of Skype calls she sought to present as evidence. However, the *only* information provided to the trial court as to the authentication of the exhibit was Mother's statement that it was "a scribe between [Father] and my sister."

¶ 57 "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2019). North Carolina Rule of Evidence 901 provides various methods to authenticate evidence, including "[t]estimony that a matter is what it is claimed to be." N.C. Gen. Stat. § 8C-1, Rule 901(b)(1).

¶ 58 On appeal, Mother argues the screenshots "should have been admitted" because they "were crucial to show the communication between

the child and her father" and Father "had introduced similar screenshots."[5] We note that the admission of Father's "similar screenshots" is not relevant to whether Mother's evidence should be admitted. We must assume that Father's evidence was either properly authenticated or Mother failed to object to admission of his evidence; there is no issue on appeal as to his evidence. However, beyond Mother's description of the screenshots as "a scribe between [Father] and my sister[,]" Mother presented no "evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* Based upon Mother's own statement, she was not a party to the alleged screenshots and her only knowledge of the information needed to authenticate the screenshots would have come only from her sister, who was not present to testify. Mother did not properly authenticate the screenshots and the trial court did not err by sustaining Father's objection to admission of this evidence. *Cf. State v. Gray*, 234 N.C. App. 197, 206, 758 S.E.2d 699, 705 (2014) ("We hold the testimony in this case by Detective Snowden, who recovered the text messages from Mr. Diaz's cell phone, and Ms. McKoy, with whom Mr. Diaz was communicating in the text messages illustrated in exhibit twelve, was sufficient to authenticate [photographs of the text messages]."). As a result, the trial court did not err in excluding the screenshot of the skype calls.

VIII. Conclusion

¶ 59 For the reasons discussed above, we affirm the trial court's order.

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

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5. We also note that even if the trial court had admitted Mother's exhibit, the trial court would still determine the weight and credibility of the evidence. *See Phelps*, 337 N.C. at 357, 446 S.E.2d at 25. Based upon our review of the proposed exhibit, admission of Mother's proposed screenshots would likely not change the trial court's analysis of the facts. The communications between the parties were clearly fraught with difficulty, based on the evidence presented by both parties.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 AUGUST 2021)

CONTAMINANT CONTROL, INC. v. ALLISON HOLDINGS, LLC 2021-NCCOA-430 No. 20-531	Cumberland (17CVS3532)	Affirmed
ERICKSON v. N.C. DEP'T OF PUB. SAFETY 2021-NCCOA-431 No. 20-704	Office of Admin. Hearings (19OSP04911)	Affirm
FREEMAN v. GLENN 2021-NCCOA-432 No. 20-478	Mecklenburg (18CVS22182)	No Error
IN RE S.R.J.T. 2021-NCCOA-433 No. 20-29-2	Wilkes (15JA200)	Affirmed in part, Vacated in part, and Remanded
JACKSON v. DUKE UNIV. HEALTH SYS., INC. 2021-NCCOA-434 No. 20-670	Durham (19CVS1462)	Affirmed
LOMICK v. N.C. DEP'T OF PUB. SAFETY 2021-NCCOA-435 No. 20-587	N.C. Industrial Commission (TA-26231)	Dismissed
LOWREY v. CHOICE HOTELS INT'L, INC. 2021-NCCOA-436 No. 20-662	Durham (19CVS3400)	VACATED AND REMANDED WITH INSTRUCTIONS
LOWREY v. CHOICE HOTELS INT'L, INC. 2021-NCCOA-437 No. 20-649	Durham (19CVS3400)	VACATED AND REMANDED WITH INSTRUCTIONS
ROSS v. N.C. STATE BUREAU OF INVESTIGATION 2021-NCCOA-439 No. 20-599	N.C. Industrial Commission (TA-24836)	Affirmed
STARNES v. STARNES 2021-NCCOA-440 No. 21-26	Catawba (17CVD1148)	Affirmed

STATE v. FORTE 2021-NCCOA-441 No. 19-1157	Wilson (15CRS50196) (15CRS50200) (15CRS50247) (15CRS50473)	No Error in Part, Vacated in Part, and Remanded
STATE v. GAVIN 2021-NCCOA-442 No. 20-172	Wake (17CRS208896) (17CRS210187)	No Error
STATE v. LENT 2021-NCCOA-443 No. 20-565	Brunswick (19CRS1415) (19CRS1417) (19CRS2335) (19CRS51914) (19CRS51915)	No Error
STATE v. LINDSEY 2021-NCCOA-444 No. 20-609	Richmond (17CRS52679-81) (17CRS52683-84) (18CRS1434)	Dismissed in Part, Vacated in Part, and Remanded
STATE v. WELCH 2021-NCCOA-445 No. 20-642	Chatham (18CRS577)	No Error
STATE v. YORK 2021-NCCOA-446 No. 20-601	New Hanover (17CRS3405) (17CRS52659)	Dismissed in Part; No Plain Error in Part

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